APPENDIX

Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. 72-586

ELMER O. CADY, WARDEN,
Petitioner,

-v-

CHESTER J. DOMBROWSKI,
Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI FILED
OCTOBER 11, 1972
CERTIORARI GRANTED DECEMBER 11, 1972

IN THE

SUPREME COURT OF THE UNITED STATES

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ELMER O. CADY, WARDEN,
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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

CHESTER J. DOMBROWSKI,
Petitioner,

vs. Case No. 70-C-129

ELMER CADY, Warden,
Respondent.

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES.

Document No.

1 3/10/70 Petition for a writ of habeas.

2 3/10/70 Order (KPG) granting leave to file petition in forma pauperis and directing respondent to file a return to the petition not later than 3/25/70 showing cause, if any, why writ should not issue and certifying the true cause of the detention.

4 3/25/70 Return to Petition for Habeas Corpus.

5 4/8/70 Traverse to Return to Petition for Habeas Corpus.

6 4/10/70 Order following conference with the court (RET). Evidentiary hearing, if any, will be limited to proof relating to the allegations of paragraph 10(c) of the petition. Briefs ordered in support of petition, etc.

7 6/5/70 Stipulation of the parties that Exhibits A, B, C, D, and E shall constitute the entire state court record for determination of this case, etc.

Document No.		
9	12/2/70	Decision and order (MLG) denying petition for a writ of habeas corpus.
10	12/14/70	Petitioner's Notice of Appeal to the U.S. Court of Appeals, 7th Circuit, from order entered on 12/2/70. (Copy mailed to Wm. Platz on 12/14/70).
11	12/14/70	Notice of Appeal to the U.S. Court of Appeals, from order entered on 12/2/70 filed by petitioner's attorney. (Copy mailed to W. Platz on 12/15/70).
12	12/14/70	Petition for Certificate of Probable Cause.
13	12/22/70	Certificate of Probable Cause granted (MLG).
14	1/20/71	Stipulation of the parties that part of record be retained in District Court, pursuant to Rule 11(f), Federal Rules of Appellate Procedure.
16	6/30/72	Mandate received from U.S. Court of Appeals, 7th Circuit ordering that judgment in District Court be reversed and that the case be remanded with direction to grant the relief prayed for in the petition unless the Wisconsin authorities grant Dombrowski a new trial within a reasonable period to be set by the District Court in accordance with the opinion filed June 2, 1972.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

Chester J. Dombrowski Full name and prison number (if any) of Petitioner vs. Elmer Cady, Warden Name of Respondent	Case No. 70-C-129 (To be supplied by the Clerk of the District Court)

PETITION FOR WRIT OF HABEAS CORPUS, Filed March 10, 1970. [Document No. 1.] [Extraneous parts omitted in printing.]

1. Place of detention: Wisconsin State Prison, Waupun, Dodge County, Wisconsin

2. Name and location of court which imposed sentence: County Court - Br. II, Fond du Lac County, Wisconsin

3. The case number or numbers (if known) upon which and the offense or offenses for which sentence was imposed:

   (a) Case No. 77626

   (b) Murder - 1st degree - Section 940.01, Wisconsin Statutes

4. The date upon which sentence was imposed and the terms of the sentence:

   (a) August 1, 1968 - Sentenced to Life Imprisonment

5. Check whether a finding of guilty was made

   (b) after a plea of not guilty X

6. If you were found guilty after a plea of not guilty, check whether that finding was made by

   (a) a jury X

7. Did you appeal from the judgment of conviction or the imposition of sentence? Yes

8. If you answered "yes" to (7), list

   (a) the name of each court to which you appealed:

      1. Wisconsin Supreme Court

   (b) the result in each such court to which you appealed:

      1. Judgment Affirmed

   (c) The date of each such result:

      1. October 31, 1969

   (d) if known, citations of any written opinion or orders entered pursuant to such results:

      1. Wisconsin Supreme Court No. State 26, August Term, 1969

      11. 44 Wis. 2d 486 (1969)

      111. 171 NW 2d 349

10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:

   (a) The petitioner, Dombrowski, is being unlawfully held in custody as a result of a conviction in Case No. 77626, Branch II, County Court, Fond du Lac County, Wisconsin, based upon evidence obtained in an illegal and unreasonable search and seizure, conducted on September 12, 1967 of a 1967 Ford Thunderbird automobile, without a search warrant. This violated Dombrowski's rights to be free of illegal and unreasonable searches and seizures and to due process of law under the Fourth, Fifth and Fourteenth Amendments to the United States Constitution.

(b) The petitioner, Dombrowski, is being unlawfully held in custody as a result of a conviction in Case No. 77626, Branch II, County Court, Fond du Lac County, Wisconsin, based upon evidence obtained in an illegal and unreasonable search and seizure, conducted on September 12, 1967, of the Bernard Dombrowski farm, without a search warrant, which was conducted as a result of an illegal and unreasonable search and seizure set forth in 10(a) and as a result of the divulgence of privileged and confidential communication with his attorney. This violated Dombrowski's rights to be free of illegal and unreasonable searches and seizures, to due process of law and to the effective assistance of counsel under the Fourth, Fifth, Sixth and Fourteenth Amendments to the United States Constitution.

(c) The petitioner, Dombrowski, is being unlawfully held in custody as a result of a conviction in Case No. 77626, Branch II, County Court, Fond du Lac County, Wisconsin, based upon evidence obtained in an illegal and unreasonable search and seizure, conducted on September 12, 1967 of a 1960 Dodge automobile belonging to petitioner, without a search warrant, which was conducted as a result of illegal and unreasonable search and seizures set forth in 10(a) and 10(b) above and a result of the divulgence of privileged and confidential communications with his attorney. This violated Dombrowski's rights to be free of illegal and unreasonable searches and seizures, to due process of law and to the effective assistance of counsel under the Fourth, Fifth, Sixth and Fourteenth Amendments to the United States Constitution.

(d) The petitioner, Dombrowski, is being unlawfully held in custody as a result of a conviction in Case No. 77626, Branch II, County Court, Fond du Lac County, Wisconsin, based upon evidence obtained in an illegal search and seizure, conducted on September 12, 1967 of a 1960 Dodge, pursuant to a search warrant which was defective in that it was not supported by probable cause, was the result of earlier illegal searches and seizures set forth in 10(a) (b) and (c) and the divulgence of privileged and confidential communications, was defective in that said search warrant failed to particularly describe the things to be seized and was improperly executed and returned. This violated Dombrowski's rights to be free of illegal and unreasonable searches and seizures, to due process of law and to the effective assistance of counsel under the Fourth, Fifth, Sixth and Fourteenth Amendments to the United States Constitution.

(e) The petitioner, Dombrowski, is being unlawfully held in custody as a result of a conviction in Case No. 77626, Branch II, County Court, Fond du Lac County, Wisconsin, based upon evidence obtained in an illegal search and seizure, conducted on September 13, 1967 of his 1960 Dodge by Cleon Mauer of the State Crime Laboratory, without a search warrant, which was conducted as a result of illegal and unreasonable searches and seizures set forth in 10(a) (b) (c) and (d) above and as a result of the divulgence of privileged and confidential communications between Dombrowski and his attorney. This violated Dombrowski's rights to be free of illegal and unreasonable searches and seizures, to due process of law and to the effective assistance of counsel under the Fourth, Fifth, Sixth and Fourteenth Amendments to the United States Constitution.

(f) The petitioner, Dombrowski, is being unlawfully held in custody as a result of a conviction in Case No. 77626, Branch II, County Court, Fond du Lac County, Wisconsin, based upon evidence, to-wit: the testimony of Clyde Schloemer, Dombrowski's former attorney, given on July 11, 1968, as to certain privileged and confidential communications between Dombrowski and his attorney on September 12, 1967, over the objection of both Schloemer and Dombrowski. This violated Dombrowski's rights to the effective assistance of counsel, to the privilege against self-incrimination and to due process of law under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution.

(g) The petitioner, Dombrowski, is being unlawfully held in custody as a result of a conviction in Case No. Wisconsin, based upon the denial to Dombrowski of a fair trial and due process of law by the prosecutor's inflammatory and prejudicial comments and remarks, including comment upon Dombrowski's exercising his privilege against self-incrimination. This violated Dombrowski's rights to a fair trial, to due process of law, to his privilege against self-incrimination and to a fair and impartial jury deliberation under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution.

11. State concisely and in the same order the facts which support each of the grounds set out in (10):

(a) On September 11, 1967, the petitioner, Chester Dombrowski, while driving a rented 1967 Ford Thunderbird automobile was involved in an accident, north of Kewaskum, Washington County, Wisconsin, in which

his car left the road and became disabled. Dombrowski was injured in the accident. He obtained a ride into Kewaskum, Wisconsin, from a passing motorist. Dombrowski was returned from Kewaskum to the accident scene by two Washington County Deputy Sheriffs. One Officer searched the vehicle and found nothing. While at the accident scene the car was locked and the deputies had the car towed by a wrecker to the Honeck Garage in Kewaskum. The deputies took Dombrowski to the Sheriff's Office in West Bend, Wisconsin, and after converring in person with Aldwin Seefeldt, Assistant District Attorney, placed Dombrowski under arrest for drunken driving. Dombrowski was then taken to the West Bend Police Station for a breathalyzer test and then finally Dombrowski was taken to St. Joseph's Hospital, West Bend, Wisconsin, where he was seen by a doctor and hospitalized for his injuries. About two and one-half (2-1/2) hours after Dombrowski's arrest, one of the deputy sheriffs, on September 12, 1967, traveled from the hospital at West Bend, Wisconsin, to Honeck's Garage at Kewaskum, Wisconsin, and conducted a detailed search of the vehicle. The deputy seized certain articles from the trunk of the car which produced leads to other evidence. The articles seized were subsequently admitted into evidence against Dombrowski. This search of the disabled 1967 Ford Thunderbird was conducted without a search warrant and without the knowledge or consent of Dombrowski.

(b & c) On September 12, 1967, as a result of the articles seized in the search of the 1967 Ford Thunderbird automobile, sheriff's investigators went to Dombrowski's guarded hospital room to interrogate him. Dombrowski asked to confer with an attorney. He subsequently conferred with Attorney Clyde Schloemer.

After the conference, Schloemer left the hospital room and had the investigator and District Attorney meet with him in the hospital reception area and advised them that his client believed there was a body lying near the family picnic area on his brother's farm. Mr. Dombrowski had not consented to the divulgence of any confidential and privileged communication between him and his counsel and did not make any knowing or intelligent waiver of his federal constitutional right to the effective assistance of counsel.

On the same day, as a result of the information obtained, Washington and Fond du Lac County law enforcement authorities accompanied by a legal associate of Mr. Schloemer immediately went to the farm and, without a search warrant, conducted a search of the picnic and other areas of the Dombrowski farm. They also conducted a search without a warrant of a disabled 1960 Dodge automobile. They obtained evidence which produced additional leads and which was admitted into evidence in Dombrowski's trial.

On September 13, 1967 at about 9:30 a.m. a deputy sheriff applied for a search warrant to search the Dombrowski farm. The application for search warrant was obviously based upon earlier illegal and unreasonable searches and seizures and the divulgence of confidential and privileged communication between Dombrowski and his attorney. The application lacked probable cause. It was based in part upon hearsay which was not corroborated or shown to be reliable.

(d) At about 8:00-8:15 p.m. on September 12, 1967, the Sheriff's investigator applied for a search warrant to again search the 1960 Dodge automobile. The applica-

tion for the search warrant lacked probable cause, was based upon unknown communications by the deputy sheriff and the magistrate which are not of record, hearsay which was not corroborated or shown to be reliable and information obtained from and as a result of the prior searches and the disclosure of privileged communications by Attorney Schloemer as more fully appear by said applications. The warrant was issued without particularly describing the things to be seized, as appears from the warrant. The undersheriff conducted a further search of the vehicle and seized items of evidence. The required return failed to disclose material items seized during the search.

(e) Subsequently on September 13, 1967, Mr. Cleon Mauer of the State Crime Laboratory, without a search warrant, conducted a further search of the disabled 1960 Dodge automobile. This search was based upon the illegal and unreasonable searches and seizures previously conducted and the divulgence of privileged and confidential communications between Dombrowski and his attorney. He seized additional articles of evidence which were admitted into evidence during Dombrowski's trial.

(f) On July 11, 1968 during the course of Dombrowski's trial, his former attorney, Clyde Schloemer, called as a witness for the State, testified to certain confidential and privileged communications between him and Dombrowski, over the objection of both Schloemer and Dombrowski.

(g) On July 18, 1968, during the prosecutor's closing argument, the District Attorney, Alexander P. Semenas, made inflammatory remarks describing Dombrowski as

vicious and violent and calling for Dombrowski's extermination and commented upon Dombrowski's exercising his federal constitutional right against self-incrimination.

12. Prior to this petition have you filed with respect to this conviction

(a) any petitions in any State court? No

(b) any petitions in any Federal Court for habeas corpus? No

(c) any petitions in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? No

(d) any other petitions, motions or applications in this or any other court? Yes

13. If you answered "yes" to any part of (12), list with respect to each petition, motion or application

(a) the specific nature thereof:

1. Motion for Rehearing

(b) the name and location of the court in which each was filed:

1. Wisconsin Supreme Court - Madison, Wisconsin

(c) the disposition thereof:

1. Denied

(d) the date of each such disposition:

1. December 19, 1969

(e) if known, citations of any written opinions or orders entered pursuant to each such disposition:

1. No written opinion filed

14. Has any ground set forth in (10) been previously presented to this or any other court, state or federal, in any petition, motion or application which you have filed? Yes

15. If you answered "yes" to (14), identify

(a) which grounds have been previously presented:

1. All of them

(b) the proceedings in which each ground was raised:

1. Pre-trial Motions Appeal

11. Trial Motion for Rehearing

111. Post-conviction Motions

17. Were you represented by an attorney at any time during the course of

(a) your plea to the charge in the trial court? Yes

(b) your trial, if any? Yes

(c) your sentencing? Yes

(d) your appeal, if any, from the judgment of conviction or the imposition of sentence? Yes

(e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? Yes

18. If you answered "yes" to one or more parts of (17), list

(a) the name and address of each attorney who represented you:

1. David E. Leichtfuss - throughout entire proceedings
   324 East Wisconsin Avenue, Milwaukee, Wis. 53202

11. Robert N. Gordon -
   6th and Hickory Streets, West Bend, Wis. 53095

(b) the proceedings at which each such attorney represented you:

1. In all proceedings

11. Pre-trial motions, motions, post-conviction motions

19. If you are seeking leave to proceed in forma pauperis, have you completed the sworn affidavit setting forth the required information (see instructions, page 1 of this form)? Yes

/s/ Chester J. Dombrowski
Signature of Petitioner
Chester J. Dombrowski

Chester J. Dombrowski, being first sworn under oath, presents that he has subscribed to the foregoing petition and does state that the information therein is true and correct to the best of his knowledge and belief.

/s/ Chester J. Dombrowski
Signature of Petitioner
Chester J. Dombrowski

(Jurat omitted in printing.)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

RETURN TO PETITION FOR HABEAS CORPUS, Filed March 25, 1970. [Document No. 4.]
[Caption omitted in printing.]

The respondent above named by Robert W. Warren, Attorney General, and William A. Platz and David C. Mebane, Assistant Attorneys General, his attorneys, for his return to the petition for a writ of habeas corpus admits, denies and alleges as follows:

1. ADMITS that the petitioner is in the custody of respondent pursuant to a judgment and commitment of a court of competent jurisdiction, namely, Branch II of the County Court of Fond du Lac County, Wisconsin, wherein petitioner was convicted of the crime of murder in the first degree and sentenced to serve life imprisonment in the Wisconsin State prison as more fully appears from the certificate of conviction and sentence, a true copy of which marked Exhibit A is hereto attached and made part hereof.

2. ADMITS all the allegations contained in paragraph 7, 8 and 9 of the Petition.

3. ALLEGES that the facts and law are as set forth in the published opinion of *State of Wisconsin v. Chester J. Dombrowski* State No. 26, 44 Wis. 2d 486 (1969) 171 N.W. 2d 349, a copy of which marked Exhibit B is attached hereto and made part hereof.

4. DENIES the allegations contained in paragraphs 10(a) and 10(b) of the petition.

5. DENIES the allegations of paragraph 10(c) of said petition, and DENIES the petitioner has exhausted state

remedies with reference to the allegations of paragraph 10(c), since said allegations were not included in petitioner's appeal to the Wisconsin Supreme Court on appeal from judgment or motion for rehearing.

6. DENIES the allegations contained in paragraphs 10(d), 10(e), 10(f) and 10(g).

7. DENIES the allegations and facts contained in paragraph 11 in its entirety and respectfully refers the Court to the facts set forth in Exhibit β attached hereto and made part hereof.

8. ALLEGES that he lacks knowledge and information sufficient to form a belief as to the truth of the facts contained in paragraph 12 of the Petition.

9. ADMITS the allegations and facts of paragraph 13 of the Petition.

10. ADMITS the allegations of paragraph 14 of the Petition.

11. DENIES the allegations of paragraph 15 that all grounds of paragraph 10 of the Petition had previously been presented to a State Court, and specifically DENIES that the petitioner has exhausted state remedies with reference to the allegations of paragraph 10(c) since said allegations were not included in the petitioner's appeal to the Wisconsin Supreme Court (Exhibit B) or motion for rehearing.

12. ADMITS the allegations of paragraph 17 and 18 of the Petition.

13. ALLEGES that he lacks knowledge and information sufficient to form a belief as to the truth of the facts contained in paragraph 19 of the Petition.

Dated at Madison, Dane County, Wisconsin, this 23d day of March, A.D. 1970.

ROBERT W. WARREN
Attorney General

WILLIAM A. PLATZ
Assistant Attorney General

/s/ David C. Mebane
DAVID C. MEBANE
Assistant Attorney General

Attorneys for Respondent

Post Office Address:

114 East, State Capitol
Madison, Wisconsin

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

CHESTER J. DOMBROWSKI,
Petitioner,

vs. No. 70-C-129

ELMER CADY, Warden,
Respondent.

ORDER FOLLOWING CONFERENCE WITH THE COURT. Filed April 10, 1970. [Document No. 6.]

The parties having appeared by their respective counsel at a pre-trial conference in the above matter held on April 10, 1970, pursuant to notice, and said counsel having so agreed;

IT IS ORDERED: That the subsequent course of this action shall be governed by the following stipulations unless modified by the court to prevent manifest injustices;

1. The evidentiary hearing, if any, will be limited to proof relating to the allegations of Paragraph 10 (c) of the petition. Counsel for the petitioner will notify the court and opposing counsel whether he believes such a hearing to be necessary by April 17, 1970, and, if he desires a hearing, will include in his notification an identification of witnesses to be called and an estimate of the length of the hearing. The respondent does not waive his position that the petitioner has failed to exhaust his State remedies as to Paragraph 10 (c).

2. The entire State court record in the above matter, including briefs filed in the Wisconsin Supreme Court and the records relating to pre-trial requests for a writ of prohibition, will be filed by the respondent as soon as possible, together with a proposed stipulation as to the accuracy and completeness of that record.

3. Petitioner's brief in support of his petition will be filed not later than June 10, 1970; an evidentiary [answering] brief will be filed within thirty days after receipt by the respondent of petitioner's brief; a reply brief will be filed within two weeks after receipt by the petitioner of the answering brief.

Dated, Milwaukee, Wisconsin, this 10th day of April, 1970.

/s/ Robert E. Tehan
U. S. District Judge.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

STIPULATION AS TO CONTENTS OF RECORD. Filed June 5, 1970. [Document No. 7.]
[Title omitted in printing.]

It is hereby stipulated that the following five exhibits attached hereto and marked Exhibit A, Exhibit B, Exhibit C,

Exhibit D, and Exhibit E shall constitute the entire state court record for determination of the above entitled matter herein.

It is hereby further stipulated that said Exhibits A, B, C, D, and E are accurate and complete insofar as necessary for determination of the above described matter.

/s/ David C. Mebane
DAVID C. MEBANE
Assistant Attorney General

Attorney for Respondent

/s/ David E. Leichtfuss
DAVID E. LEICHTFUSS

Attorney for Petitioner

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

CHESTER J. DOMBROWSKI,
Petitioner,

v. No. 70-C-129

ELMER O. CADY, Warden,
Respondent.

DECISION AND ORDER DENYING PETITION FOR WRIT OF HABEAS CORPUS. Filed December 2, 1970. [Document No. 9.]

Mr. Dombrowski was convicted by a state court on July 18, 1968, of the first-degree murder of Herbert L. McKinney and presently is serving a sentence of life imprisonment in the state prison at Waupun. The petitioner's conviction was affirmed by the Wisconsin supreme court in State v. Dombrowski, 44 Wis.2d 486, 171 N.W.2d 349 (1969). In this petition for a writ of habeas corpus, Mr. Dombrowski contends that certain of the evidence used to convict him was acquired by infringement of his fourth amendment rights.

On the evening of September 11, 1967, the petitioner was involved in an automobile accident near Kewaskum, Wisconsin, while driving a rented 1967 Thunderbird automobile. A passing motorist gave him a ride into Kewaskum where the petitioner called the county sheriff's office to report the accident. Mr. Dombrowski returned to the accident scene accompanied by two deputy sheriffs. The deputies briefly searched the car and then had it towed to a garage in Kewaskum. The petitioner was taken to the sheriff's office in West Bend, Wisconsin, where he was placed under arrest for drunken driving.

Approximately two and one quarter hours after the petitioner's arrest, deputy William Weiss went to the garage in Kewaskum and, without a search warrant or Mr. Dombrowski's consent, inspected the inside of the Thunderbird, including the trunk area. There he found evidence which ultimately contributed to Mr. Dombrowski's conviction for murder.

Testimony at the trial disclosed that Mr. Dombrowski had told the arresting deputies several times that he was an officer with the Chicago police department. Deputy Weiss testified that he understood that metropolitan police officers always carried their service revolvers with them. On the basis of this belief, the deputy stated that he returned to the locked Thunderbird to look for the revolver.

In affirming the petitioner's conviction, a divided Wisconsin supreme court concluded that the inspection of the Thunderbird by deputy Weiss was not a "search", citing definitions found in Haerr v. United States, 240 F.2d 533 (5th Cir. 1957), and Edwards v. State, 38 Wis. 2d 332, 156 N.W.2d 397 (1968). The majority concluded that deputy Weiss' inspection was made within a reasonable time after the car was towed to the garage, was done with the purpose of protecting Mr. Dombrowski's property (the service revolver), and was not made as part of a search for incriminating evidence.

In Preston v. United States, 376 U.S. 364 (1964), the petitioner and his companions were arrested for vagrancy when they could give no satisfactory explanation of their activities. They were taken to a police station; their automobile, which was not searched at the time of the arrest, was driven to the station by a police officer and then towed to a garage. A little later, several police officers went to the garage and there searched the automobile without a warrant, finding evidence in the trunk that was ultimately used to convict the petitioner and the others for conspiracy to rob a federally insured bank.

In reversing the convictions, the supreme court stated, in part, at page 366:

> "Our cases make it clear that searches of motorcars must meet the test of reasonableness under the Fourth Amendment before evidence obtained as the result of such searches is admissible. E.g., *Carroll v. United States*, 267 U.S. 132 (1925); *Brinegar v. United States*, 338 U.S. 160 (1949)."

The court continued at page 367:

> "The rule allowing contemporaneous searches is justified, for example, by the need to seize weapons and other things which might be used to assault an officer or effect an escape, as well as by the need to prevent the destruction of evidence of the crime—things which might easily happen where the weapon or evidence is on the accused's person or under his immediate control. But these justifications are absent where a search is remote in time or place from the arrest. Once an accused is under arrest and in custody, then a search made at another place, without a warrant, is simply not incident to the arrest."

The respondent relies on Harris v. United States, 390 U.S. 234 (1968). In *Harris*, the petitioner's automobile was seen leaving the scene of a robbery; the vehicle was traced and the petitioner was arrested when he was seen entering it near his home. Following a quick search of the car, the arresting officer took the petitioner to the police station and the automobile was impounded as evidence.

A police department regulation required the search of all impounded vehicles, the inventory and removal of all valuables from them, and the attachment of a property tag detailing the circumstances of the impounding. As the arresting officer opened the passenger's door on the petitioner's automobile, he saw a registration slip belonging to the robbery victim on the metal strip over which the door closed.

The court held that the discovery of the registration slip was not the result of a search. Noting that "the discovery of the card was . . . the result . . . of a measure taken to protect the car while it was in police custody", the court went on to state that "Nothing in the Fourth Amendment requires the police to obtain a warrant in these narrow circumstances." Other cases with similar holdings are Creighton v. United States, 406 F.2d 651 (D.C. Cir. 1968), and United States v. Blackburn, 389 F.2d 93 (6th Cir. 1968).

In Cooper v. California, 386 U.S. 58 (1968), the defendant's automobile was impounded following his arrest on a narcotics charge. About a week later, the automobile was searched without a warrant for narcotics. The court found no illegality in the search on the basis that the police had lawful custody of the car and the search was closely related to the reason for the arrest and the reason the automobile had been impounded. *Preston* was distinguished on the basis that in that case there had been no relationship between the arrest, the reason for the seizure of the vehicle, and the reason for the search.

In Williams v. United States, 412 F.2d 729 (5th Cir. 1969), the court stated at page 733:

> "*Preston* and *Cooper* are somewhat difficult of analysis because they represent two distinct approaches to the same kind of case. In *Preston*, the Court tacitly assumed, probably because of the way the case was argued, that the search would be unlawful if not incident to arrest. On the basis of the conclusion that '[o]nce an accused is under arrest and in custody, then a search made at another place, without a warrant, is simply not incident to the arrest,' 376 U.S. at 367, 84 S.Ct. at 883, the search was held unlawful. In *Cooper*, on the other hand, it could not even be argued that the search was incident to a valid arrest, but rather than confine its attention to that question, as it had done in *Preston*, the Court went on to consider the reasonableness of the search under all the circumstances. As we read the opinion, the Court held that any warrantless search is to be judged by its reasonableness under all the circumstances. In taking this approach, the Court adopted as its test a dictum from United States v. Rabinowitz, 1950, 339 U.S. 56, 66, 70 S.Ct. 430, 435, 94 L.Ed. 653: 'The relevant test is not whether it is reasonable to procure a search warrant, but whether the search was reasonable' (quoted in *Cooper* at 386 U.S. 62, 87 S. Ct. 791)."

In my opinion, *Harris* is reasonably analogous to the case at bar. Deputy Weiss testified that it was his department's "standard procedure" to look for a service revolver in a situation like the one presented. Deputy Boudry also testified that he had looked for the missing gun at the scene of the accident. Although the line is a narrow one, I conclude that the examination of the car at the garage was not a search in the *Preston* sense, but rather it was an inspection designed

to locate an article of value, to be protected by those responsible for its custody. This was not a search for incriminating evidence and is constitutionally permissible under *Harris*.

Under the circumstances of the case at bar, I conclude that the examination of the Thunderbird by deputy Weiss was reasonable. At the time of this inspection, it appears that there was no suspicion on the part of the officers of any other misconduct by the defendant; the deputy was interested in protecting the petitioner's property. In seeking to locate the service revolver, the deputy came upon blood-splattered articles which he could not be expected to ignore; this distinguishes the case at bar from the case in which the officers, under a guise of making a belated "custody search", attempt to buttress their having arrested the defendant. See my dissent in State v. Stevens, 26 Wis.2d 451, 465, 132 N.W.2d 502, 509 (1965).

The petitioner also advances various other grounds, none of which reaches such constitutional proportions to warrant granting of the writ.

Therefore, IT IS ORDERED that Mr. Dombrowski's petition for a writ of habeas corpus be and hereby is denied.

Dated at Milwaukee, Wisconsin, this 2nd day of December, 1970.

/s/ Myron L. Gordon
U. S. District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

STIPULATION THAT PART OF RECORD BE RETAINED IN DISTRICT COURT. Filed January 20, 1917. [Document No. 14.] [Title omitted in printing.]

It is hereby stipulated by and between the parties by their respective counsel that, pursuant to Rule 11 (f), Federal Rules of Appellate Procedure, that Exhibits A, B, C, D and E of the record shall be retained in the District Court unless hereafter the United States Court of Appeals for the Seventh Circuit shall order or any party shall request their transmittal. Exhibits A, B, C, D and E shall nevertheless be a part of the record on appeal for all purposes.

Dated: January 19, 1971

/s/ David E. Leichtfuss
David E. Leichtfuss

/s/ William J. Mulligan
William J. Mulligan

Attorneys for Petitioner-Appellant

Robert Warren
Attorney General

By /s/ Mary V. Bowman
Assistant Attorney General

Attorneys for Respondent-Appellee

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT REVERSING THE ORDER OF THE DISTRICT COURT. Filed June 2, 1972.

This opinion is printed in the Appendix to the Petition for Writ of Certiorari at pages 101-112.

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT DENYING REHEARING. Filed July 24, 1972.

This order is printed in the Appendix to the Petition for Writ of Certiorari at page 113.

FOLDOUT(S) IS/ARE TOO LARGE TO BE FILMED

STATE OF WISCONSIN
FOUN DU LAC COUNTY
COUNTY COURT BRANCH II

SEARCH WARRANT for 1967 Ford Thunderbird, dated September 12, 1967, and filed September 14, 1967.

WHEREAS, Raymond Howard has this day complained to the said Court upon oath that on the 12th day of September, 1967, in the County of Fond du Lac, there is now located One (1) Automobile, to-wit: 1967 Ford Thunderbird, License No. Illinois HC8318, which may be the automobile used in the commission of a crime or may constitute crime; to-wit: murder, committed in violation of Section 940.01 (1) of the Wisconsin Statutes and prayed that a search warrant be issued to search the above stated vehicle.

NOW, THEREFORE, in the name of the State of Wisconsin, you are commanded forthwith to search the said vehicle stated herein and if the same articles of evidence of crime are found therein, to bring the same before the Court and return this warrant within 48 hours before the said Court, to be dealt with according to law.

DATED this 12th day of September, 1967. *8:15 P.M.*

/s/Hazen W. McEssy
Honorable Hazen W. McEssy
County Court Branch II
Fond du Lac County
Fond du Lac, Wisconsin

STATE OF WISCONSIN
FOND DU LAC COUNTY
COUNTY COURT BRANCH II

INDORSEMENT ON WARRANT FOR 1967 FORD THUNDERBIRD AND RETURN OF OFFICER, dated September 14, 1967, and filed with Fond du Lac County Court on September 14, 1967.

INDORSEMENT ON WARRANT

RECEIVED BY ME *September 12,* 1967, at *8:15* o'clock *P.M.*

/s/ Raymond Howard

RETURN OF OFFICER

I hereby certify that by virute of the within warrant, I searched the within named premises and found the following things:

On the 1967 Ford Thunderbird, Illinois No. HC83108. We found an application or a receipt where the same party, Chester Dombrowski who owns the Dodge, (1960) has made this application with Hertz Rent-A-Car at O'Hare Field, Chicago, Illinois:

and have the same now in my possession subject to the direction of the Court.

DATED THIS *14* day of September, 1967.

/s/ Raymond Howard

STATE OF WISCONSIN
FOND DU LAC COUNTY
COUNTY COURT BRANCH II

SEARCH WARRANT FOR FARM, FARM BUILDINGS AND HOME, dated September 13, 1967, and filed with Fond du Lac County Court on September 14, 1967.

Whereas, Dan Sondergard has this day complained to the said Court upon oath that on the *13* day of September, 1967, in said County, in the Town of Auburn, in and upon certain premises more particular known as the farm, farm buildings and home owned or believed to be owned by C. Dumbrowski and B. Dombrowski and partly occupied by C. Dombrowski and D. Dombrowski, there are now believed to be located and concealed certain things, to-wit: Blunt instrument of some type, some Caliber Rifle, or a .38 Caliber Revolver, and the affiant also observed through the windows of the house stains which appeared to be blood stains, which were or may be those that were used, or caused in the commission of the crime or may constitute a crime: to-wit: murder, comitted in violation of section 940.01(1) of the Wisconsin Statutes and prayed that a search warrant be issued to search said premises for said property.

NOW, THEREFORE, in the name of the State of Wisconsin you are commanded forthwith to search the said premises for said things, stated in and if the same or any portion thereof are found, to bring the same and the person in whose possession the same are found and return this warrant within 48 hours before the said Court, County Court Branch II, Fond du Lac County, Fond du Lac Wisconsin, to be dealt with according to law.

Dated this *13* day of September, 1967.

/s/ H. W. McEssy
H. W. McEssy, Judge
County Court Branch II
Fond du Lac, County, Wisconsin

STATE OF WISCONSIN
FOND DU LAC COUNTY
COUNTY COURT BRANCH II

INDORSEMENT ON WARRANT FOR FARM, FARM BUILDINGS AND HOME, AND RETURN OF OFFICER, Dated September 14, 1967, and filed with Fond du Lac County Court on September 14, 1967.

INDORSEMENT ON WARRANT

RECEIVED by me Sept. 13, 1967, at 10:00 A.M.

/s/ Dan Sondergard
Dan Sondergard

RETURN OF OFFICER

I hereby certify that by virtue of the within warrant, I searched the within named premises and found the following things:

(1) One sealed paper bag containing partial box of match books

(2) One sealed paper bag containing four stones

(3) One sealed paper bag containing partial box of Puritan 3 ox. cups

(4) One sealed paper bag containing empty beer can and one drinking glass

(5) One sealed screw-top jar containing stain recovered from floor

(6) One sealed screw-top jar containing stains recovered from floor

(7) One screw-top jar containing section of stained cloth recovered from mattress of bed

DATED this 14th day of September, 1967

/s/ Dan Sondergard
Dan Sondergard

RECEIPT FOR 1960 DODGE SEDAN. Filed with Fond du Lac County Court on September 14, 1967.

Fond du Lac County
Wisconsin

Office of the Sheriff
Safety Building, Fond du Lac, Wisconsin
54935
Dial 922-4141

Date September 14, 1967

Received of County Court Branch II:

One 1960 Dodge Sedan belonging to Chester Dombroski and one colored photograph of back seat with blood stains of 1960 Dodge.

/s/ Harry E. Rozek
Harry E. Rozek, Sheriff

Fond du Lac County, Wisconsin

RECEIPT FOR 1967 FORD THUNDERBIRD. Filed with Fond du Lac County Court on September 14, 1967.

Fond du Lac County
Wisconsin

Office of the Sheriff
Safety Building, Fond du Lac, Wisconsin
54935
Dial 922-4141

Date September 14, 1967

Received of County Court Branch II:

One 1967 Ford Thunderbird rented from O'Hare Field, Chicago, Illinois, by Chester Dombroski.

/s/ Harry E. Rozek
Harry E. Rozek, Sheriff

Fond du Lac County, Wisconsin

TRANSCRIPT OF HEARING ON REQUEST FOR ISSUANCE OF SEARCH WARRANTS for 1960 Dodge Sedan and 1967 Ford Thunderbird, held on September 12, 1967.

[1]

STATE OF WISCONSIN FOND DU LAC COUNTY
COUNTY COURT BRANCH II

In the matter of Request
for Issuance of Search Warrant

The following procedure was had before the Hon. H. W. McEssy, Judge of Fond du Lac County Court Branch II, in County Court II, in the city and county of Fond du Lac, Wisconsin, on the 12th day of September, 1967, at 8:02 o'clock P.M.

Alex Semenas, District Attorney, was personally present in Court.

Raymond Howard, Under-Sheriff, was personally present in Court.

COURT: This is in the matter of request for a search warrant, by the Sheriff of Fond du Lac County. The request is made in the belief that there is certain evidence that could be available at this time to the authorities in Fond du Lac County which may result in the apprehension of a person or persons who may have committed a murder in Fond du Lac County, or some other location in the State of Wisconsin; and whether or not the murder was committed in Fond du Lac County, a search warrant is requested by the Sheriff of Fond du Lac County, so that a proper

and thorough investigation can be made surrounding the circumstances which resulted in a body being found in Fond du Lac County. The Sheriff of Fond du Lac County and his assistants are of the opinion this man has been murdered. There are two motor vehicles involved. If there is evidence available to show there is presently a need for the issuance of a search warrant for the searching and impounding of said vehicles, the same may be issued.

At this time the Court will swear Under-Sheriff Raymond Howard, Under-Sheriff of Fond du Lac County.

[2] RAYMOND J. HOWARD, being first duly sworn, on oath, by the Court, testified as follows:

EXAMINATION:

BY THE COURT:

Q. What is your name? A. Raymond J. Howard.

Q. What is your address? A. 1410 East Pioneer Road, Fond du Lac, Wisconsin.

Q. What is your occupation? A. Under-Sheriff of Fond du Lac County.

Q. Were you formerly the Sheriff of Fond du Lac County? A. Yes, I was.

Q. As of this date, September 12, 1967, have you been involved in the investigation of an alleged murder in Fond du lac County? A. Yes, I have.

Q. Is it your desire — do you think it is in the best interests of the investigating authorities to examine certain automobiles? A. Yes, I do.

Q. What automobiles do you have in mind? A. I have a Dodge car at the Dombrowski farm — a Dodge car with Illinois license number LB428.

Q. Where is that car at this time? A. This is at the Dombrowski farm.

Q. Is it in Fond du Lac County? A. In Fond du Lac County.

Q. Why do you want to examine this automobile or search it? A. Because a man by the name of Chester Dombrowski had an accident just south of the Fond du Lac County line last night in which Washington County arrested him for drunken driving; and in so arresting him, they searched the car, and they found the floormat from the back of a Dodge car filled with blood and a raincoat, and a combination penknife and letter-opener; and while questioning the subject in Washington County, he demanded an attorney and said [3] A. (Ctd.) he would then give a statement. Afterwards, he would not give a statement, but the attorneys made remarks that there would be a body found on the brother's farm, which is located in Fond du Lac County.

Q. Brother of who? A. Brother of Chester Dombrowski.

Q. Is that farm in Fond du Lac County? A. The farm is in Fond du Lac County.

Q. Was there a body so found? A. There was a body so found with a person unidentified at this point, allegedly to be murdered, laying in the dump on this farm.

Q. Do you have photographs of the body? A. Yes, I have photographs of the body.

Q. Have the Court Reporter mark the photograph.

(Reporter marked photo of body as Plaintiff's Exh. 1)

Q. Now, in reference to Plaintiff's Exhibit 1, Mr. Howard, what does that indicate to you? A. That indicates to me there is a body laying in a pile of junk on the Dombrowski farm.

Q. Is that farm located in Fond du Lac County? A. Yes, it is.

Q. The body was found in Fond du Lac County? A. Yes, it was discovered by Officer Dan Sondergard.

Q. Now, where was the vehicle that you intend to investigate—to search? Where is that vehicle now? A. That vehicle is also on the Dombrowski farm, parked just northwest of the barn.

Q. Are there two vehicles or one vehicle that you want to search? A. We want to search two vehicles. We want to search the Rent-It car that is now in Kewaskum that was used in the accident; also, this Dodge that is on the Dombrowski farm.

Q. You desire to search those to ascertain whether or not there is [4] Q. (Ctd.) any evidence of murder or any other reason to believe there may be foul play in reference to the use of these two vehicles? A. Yes.

Q. Have the record show it appears to this Court that the Fond du Lac County authorities, particularly Raymond Howard, has certain evidence within his knowledge which would lead this Court to believe a Search Warrant should be issued to investigate two automobiles which may or may not be connected with the murder of the individual as yet not

identified. As to whether or not the man now held by the West Bend authorities—what is the name of the man in West Bend? A. Charles Dombrowski.

Q. — may be — Is Chester Dombrowski the man that owns these vehicles? A. He is the owner of the Dodge car that is on his brother's farm. The other vehicle is a Rent-It car from the city of Chicago.

Q. Where is this Dombrowski from? The man that is suspected of being involved in this matter? A. He is a police officer on the Chicago Police Department, living at 4854 North Monticella, Chicago.

Q. And this is his brother that lives in Fond du Lac County? A. No, his brother owns the farm in Fond du Lac County and he is also from Chicago; and the West Bend authorities called him long distance this A.M. and had permission to go on to the farm.

Q. And one of these automobiles is now in Washington County? A. In Washington County, yes, sir.

Q. The other vehicle is in Fond du Lac County? A. Yes.

Q. This Court hereby authorizes the issuance of a Search Warrant to Under-Sheriff Raymond Howard to search both vehicles and impound the same and make a report to this Court as to his findings within the next 48 hours. [5] Q. (Ctd.) Plaintiff's Exhibit 1 will be kept with the record and returned to the Court Reporter to be attached to the testimony which this Court directs be typed out, with the result being that the Sheriff — Raymond Howard, and any of his assistants that he calls to his help are entitled to search the vehicles mentioned in the testimony taken at this time.

[6]
STATE OF WISCONSIN)
FOND DU LAC COUNTY) ss.

I hereby certify that I have carefully compared the above and foregoing with my original notes taken at the hearing in the above entitled action, and I find the same to be a full, true, and correct transcript therefrom, containing all the testimony and proceedings had on said hearing.

Dated this 13th day of September, A.D., 1967

/s/ Elaine Retzleff
Elaine Retzleff, Official Reporter
for County Court, Branch No. II
Fond du Lac County, Wisconsin

[7] Plaintiff's Exhibit 1, Photograph of Body, omitted in printing.

TRANSCRIPT OF HEARING ON REQUEST FOR ISSUANCE OF SEARCH WARRANT for Farm, Farm Buildings and Home, Held on September 13, 1967.

[1]
STATE OF WISCONSIN FOND DU LAC COUNTY
COUNTY COURT BRANCH II

In the matter of the Request
for Issuance of a Search Warrant.

The following procedure was had before the Hon. H. W. McEssy, Judge of Fond du Lac County Court Branch II, in County Court II, in the city and county of Fond du Lac, Wisconsin, on the 13th day of September, 1967, at 9:35 o'clock A.M.

Mr. Alex Semenas, District Attorney, is personally present in Court.

COURT: This is a request for a search warrant by Dan Sondergard, Deputy Sheriff in and for Fond du Lac County.

Alex Semenas, District Attorney, is personally present in Court.

DANIEL SONDERGARD, being first duly sworn, on oath, by the Court, testified as follows:

EXAMINATION:

BY THE COURT:

Q. What is your name? A. Daniel R. Sondergard.

Q. What is your address? A. 46 Olcott Street, Fond du Lac, Wisconsin.

Q. Where are you employed? A. Fond du Lac County Traffic Police.

Q. Are you also a deputy sheriff for Fond du Lac County? A. Yes, sir.

Q. Now, on or about the 12th of September, 1967, were you on certain properties located in the town of Auburn, owned by a C. Dombrowski and a B. Dombrowski? A. Yes, sir, I was.

Q. Did you see any evidence of any crime that might have been committed on or about those premises? [2] A. A body had been found in the dump area on land either owned by or adjacent to them, and a vehicle owned by C. Dombrowski was found on the Dombrowski property. Also, in looking

through the window of the room maintained by the Dombrowskis, in the house, there appears some stained dark brown or reddish stain on the mattress on the bed; also, there are some rocks or stone sitting on a little table which could have possibly been the weapon that was used to inflict the damage to the forehead of the deceased party that was found in the field.

Q. Did you see the body of this deceased man? A. Yes, sir, I found him.

Q. You found the man? A. Yes.

Q. And was it in close proximity, or how far away was it from the farm buildings which you desire to search? A. It was — oh, I would say roughly fifteen hundred to two thousand feet.

Q. And you say you saw in these buildings what appeared to you to be blood stains, is that correct? A. Yes.

Q. You have reason to believe there might be any other weapons in there? A. Through the window I could see some boxes of shells on a piece of the furniture — I don't know the name of it — it is an old-fashioned piece of furniture, — there is a box of shells.

Q. Has this deceased man been identified yet as far as you know? A. No.

Q. In your opinion was he murdered? A. He was shot through the head, and beaten at least three times with a very sharp instrument of some unknown type, which possibly could have been one of these rocks or stones which are in the room with the blood stained mattress.

[3] Q. Just where is this property located that you want to search? A. It is located in the town of Auburn, Fond du Lac County, on the southeast corner of County Trunk G and County Trunk Highway S.

Q. The Southeast corner, you say? A. Yes.

Q. You want to examine the buildings and their environs? A. Yes.

Q. For the purpose of ascertaining whether or not there were any weapons that might have been used in the murder of this unidentified deceased man? A. Yes, the man was beaten before he was shot.

Q. And you found the body, yourself? A. Yes.

Q. This Court is of the opinion that Dan Sondergard, Deputy Sheriff of Fond du Lac County, is entitled to have a Search Warrant issued to the Sheriff's Department of Fond du Lac County to search the premises and report his findings to this Court within 48 hours.

Search Warrant is hereby issued.

That's all, Dan.

[4]

STATE OF WISCONSIN)
FOND DU LAC COUNTY) ss.

I hereby certify that I have carefully compared the above and foregoing with my original notes taken at the hearing in the above entitled action, and I find the same to be a full, true, and correct transcript therefrom, containing all the testimony and proceedings had on said hearing.

Dated this *13th* day of *September*, A.D., 19*67*

/s/Elaine Retzleff
Elaine Retzleff, Official Reporter
for County Court, Branch No. II
Fond du Lac County, Wisconsin

TRANSCRIPT OF HEARING ON RETURNS ON SEARCH WARRANTS, HELD ON SEPTEMBER 14, 1967.

[1]

STATE OF WISCONSIN FOND DU LAC COUNTY
COUNTY COURT BRANCH II

In the matter of a Return on
a Search Warrant issued to
Raymond J. Howard or Sheriff.

The following procedure was had before the Hon. H. W. McEssy, Judge of Fond du Lac County Court Branch II, in County Court II, in the city and county of Fond du Lac, Wisconsin, on the 14th day of September, 1967, at 10:25 o'clock A.M.

Mr. Alex Semenas, District Attorney, was personally present.

Mr. Raymond J. Howard, Under-Sheriff of Fond du Lac County, was personally present.

COURT: The matter before the Court at this time is a Return on a Search Warrant issued to Raymond Howard, Under-Sheriff of Fond du Lac County. Said Search Warrant having been issued at about 8:15 P.M. on September 12, 1967.

RAYMOND J. HOWARD, being first duly sworn, on oath, by the Court, testified as follows:

EXAMINATION:

BY THE COURT:

Q. What is your name? A. Raymond J. Howard.

Q. And your address? A. 1410 East Pioneer Road, Fond du Lac, Wisconsin.

Q. On the evening of September 12, 1967, you appeared before this Court and requested to search a 1960 Dodge automobile, License Number LB 428, which you believe might have been used in the commission of a crime. Did you search that vehicle? A. Yes, we did.

Q. And where is the vehicle now? A. The vehicle is impounded in the Safety Building garage in Fond du Lac.

[2] Q. Now, as a result of your search of the 1960 Dodge, License Number LB428, what did you find? A. We found on the right rear seat — back seat of the 1960 Dodge a large area of blood covering over twelve inches in diameter; the blood on the briefcase, which was on the left floor of the rear seat of the 1960 Dodge, and blood splattered on the back of the front seat on the 1960 Dodge.

Q. Did you examine the briefcase? A. We examined the briefcase and the articles in it were just some old papers.

Q. Were there any names or identification on the papers in the briefcase? A. Yes, there was the name of C. Dombrowski on some of the papers.

Q. No first names, just the first initial? A. Just the first initial.

Q. And you have this briefcase and papers located therein at this time? A. I believe the Sheriff has turned the briefcase and so forth over to the Wisconsin State Crime Laboratory for further investigation.

Q. Did you take any photographs of the 1960 Dodge? A. Yes, I took a photograph at 8:30 A.M. on September 13th of the back — a colored photograph of the back seat on the right side of the 1960 Dodge, showing the blood stains on that seat.

Q. Would you have that marked, Mr. District Attorney?

(Reporter marked colored photograph of car seat and back — Exhibit Returned on Search Warrant by Raymond Howard.)

Q. In what mechanical condition was this 1960 Dodge in your opinion? A. This car was not in running condition as it had a large hole pierced in the radiator.

Q. Where did you find the automobile? A. This automobile was found on the Chester Dombrowski and Bernard Dombrowski farm in the town of Auburn in Fond du Lac County.

Q. How did you remove the car from the Dombrowski farm to the [3] Q. (Ctd.) Sheriff's Garage in Fond du Lac? A. We had the Olson Wrecker Service from Fond du Lac.

Q. Did you find anything else in or about the 1960 Dodge which came to your attention as a result of the Search Warrant being issued? A. Right underneath the Dodge after we moved it, we found three books of matches with blood on; two of them partially burned and one not, in a pile of fresh straw that was laid there off of a farm wagon that was parked next to it.

Q. You say you found partially burned matches and straw under the automobile? A. Underneath the left front door of the automobile.

Q. Did you bring those matches in to the Sheriff's office? A. Them matches have been turned over to the State Crime Laboratory.

Q. Was there any inscription or writing on them advising where they might have been used or came from? A. I at this time can't say where they came from.

Q. Was there a writing or inscription on them? A. Yes, there was.

Q. And what did you do with them? A. I turned them over to the State Crime Lab to have them examined for the blood to see if it matched the blood inside the 1960 Dodge.

Q. Have you learned yet whether or not the blood does match? A. We have no report from the State Crime Lab at the present time. There was also a necktie found about four feet on the left hand side of the car; a dark blue or black necktie that was also blood-soaked, and that also was turned over to the State Crime Laboratory.

Q. Now, at or about the same time, namely: about 8:15 P.M. on September 12th, you requested a Search Warrant to search a 1967 Ford Thunderbird that had Illinois license Number HC8318. Did you search that vehicle? [4] A. Yes, we did search that vehicle.

Q. And what did your search reveal to you at that time? What did you find? A. There was an application or contract showing that the same party, Chester Dombrowski, who owned the 1960 Dodge, had rented this 1967 Thunderbird from Hertz Rent-a-Car at O'Hare Field in Chicago, Illinois.

Q. What was the name on the slip? Was it C. Dombrowski or Chester? A. I believe it was Chester Dombrowski.

Q. And that is the same name that the 1960 Dodge was licensed to? A. Yes.

Q. Is there anything else about that automobile that you saw when you examined it that you feel might be evidence of the commission of a crime, other than the fact this slip in the car bore the same name on the rental slip that is connected with the 1960 Dodge? A. No.

Q. And you have this 1967 Ford Thunderbird in the possession of the Sheriff? A. Yes, we do. It is also impounded at the Safety Building in Fond du Lac.

Q. All right, upon your return, you are hereby directed to execute the Return and turn the properties that you have that came into your possession as a result of issuance of these Search Warrants to the Sheriff of Fond du Lac County; they will be dealt with according to law after the Sheriff receipts for them.

[5]
STATE OF WISCONSIN)
FOND DU LAC COUNTY) ss

I hereby certify that I have carefully compared the above and foregoing with my original notes taken at the hearing in the above entitled action, and I find the same to be a full, true, and correct transcript therefrom, containing all the testimony and proceedings had on said hearing.

Dated this *15th* day of *September*, A.D., 1967

/s/ Elaine Retzleff
Elaine Retzleff, Official Reporter
for County Court, Branch No. II
Fond du Lac County, Wisconsin

DECISION AND ORDER ON DEFENDANT'S MOTIONS. Filed in Fond du Lac County Court on June 18, 1968.

STATE OF WISCONSIN FOND DU LAC COUNTY
BRANCH II
COUNTY COURT

STATE OF WISCONSIN,)
Plaintiff,)
)
-vs-) Case No. 77626
)
CHESTER J. DOMBROWSKI,)
Defendant.)

The defendant, through his attorneys, David E. Leichtfuss and Robert N. Gordon, moves the Court as follows:

1. Suppressing all physical evidence taken from this defendant, his automobile, any other automobile is his care, custody and control, a farm owned by Bernard Dombrowski located partially in Fond du Lac County, or elsewhere, on September 11, 1967, or any time thereafter.

2. To be furnished a copy of the Fond du Lac County Coroner's findings, conclusions and reports, including without limitation, all notes and memoranda prepared by said Coroner or any physician assisting in the autopsy which pertain and relate to the allegations contained in the indictment against this defendant.

The District Attorney for Fond du Lac County, Alexander P. Semenas, appeared in opposition to Paragraph 1 of the defendant's motion; and, as to Paragraph 2, it was stipulated on the record that the defendant's counsel would be permitted any and all information that may be in the hands of the Fond du Lac County Coroner or any physician assisting in the autopsy pertaining and related to the allegations contained in the indictment against the defendant, Chester J. Dombrowski. This Court has been advised that Paragraph 2 of the defendant's motion has been complied with pursuant to the stipulation referred to.

The District Attorney opposed Paragraph 1 of the defendant's motion, and testimony was taken in open court in the presence of all above counsel referred to and the defendant, Chester J. Dombrowski.

Though Paragraph 1 of the defendant's motion to suppress certain physical evidence taken from the defendant is vague and in general terms, the Court will endeavor to recapitulate the record made during the course of this proceeding and determine the motion on that basis.

I

There has been reference made to a search of a Thunderbird automobile owned by Hertz, but on lease to the defendant, and allegedly searched by the Washington County authorities without a warrant.

The Thunderbird vehicle was taken into custody by the Washington County authorities after an accident and while the defendant was in the West Bend Hospital. It is not indicated anywhere in the record what evidence, if any, produced as a result of this search is requested to be suppressed. At the time of the search by the Washington County authorities, however, the Washington County authorities were apprised of the fact that the defendant, Chester J. Dombrowski, was identified as a Chicago policeman and was at that time under arrest in Washington County for operating an automobile while intoxicated.

It has been held on numerous occasions in Wisconsin that on a motion to suppress evidence because of an unlawful seizure, the burden of establishing that the defendant's rights have been transgressed is upon the party asserting such transgression. The defendant has failed to meet this burden of proof in regard to the alleged search by the Washington County authorities; he called no witness in regard thereto nor any of the Washington County authorities that may have participated in the alleged original search of the Thunderbird, which facts and circumstances, so far as the record now stands, indicates that the original search of the Thunderbird was a routine police procedure, when they were charged with the responsibility of safekeeping of the defendant's property pending his release and return of his property to him.

There is nothing in the record to indicate that the Washington County authorities knew anything of any alleged murder at the time they went to search the Thunderbird and the defendant's personal articles, if any, at which time the defendant was under arrest and charged with operating an automobile while intoxicated and was in a West Bend hospital.

It would appear to the Court that the record so far as any articles taken from the Thunderbird by the Washington County authorities as a result of a custody search of the same after it was towed off the highway in a damaged condition, pursuant to police order, was nothing more than good routine police work to protect the personal property of Chester J. Dombrowski.

It is accordingly the order of this Court that the defendant's motion to supress any evidence taken from the in-custody search of the Thunderbird by the Washington County authorities is denied.

State vs. Stevens, 26 Wis. 2d 459. Lanza vs. State of New York, 370 U.S. 139. Abel vs. U.S., 362 U.S. 217. State vs. Drew, 217 Wis. 216. Gray vs. State, 243 Wis. 57.

II

Defendant further moved to suppress any evidence obtained as a result of a search of the dumping area on the farm owned by Bernard J. Dombrowski without a warrant.

The record discloses that a search was made by Washington County and Fond du Lac County authorities and other lay persons of the dumping area on the Bernard J. Dombrowski farm, which search produced the body of Herbert L. McKinney, found in the dumping area. This search was

made without a warrant, but the area searched was beyond the curtilage of the farm buildings, to-wit: 1,500 to 2,000 feet from the buildings.

The search was a routine police investigation of a report to the Washington County authorities, and passed on to the Fond du Lac County authorities, that a body could or might be found on this farm. This search in no way violated any of the defendant's constitutional rights, and it might be added that the defendant had no proprietary interest in this farm, so far as this record is concerned, other than a permissive visitor on a farm located in Fond du Lac County owned by his brother, Bernard J. Dombrowski (now deceased).

Defendant's motion to suppress any evidence gained by the authorities as a result of the search of the dumping area on the Bernard J. Dombrowski farm without a warrant falls under the "Open Fields Doctrine," the dumping area involved being well beyond the curtilage of the farm operation or any other use to which this 140 acres was being put.

It is accordingly the order of this Court that the defendant's motion to supress evidence obtained by authorities from a search of the dumping area on the Bernard J. Dombrowski farm is denied.

Weeks vs. U.S. 232 U.S. 383. Hester vs. U.S., 265 U.S. 57. Katz vs. U.S., 12/18/67, Supreme Court Reporter, Vol. 88 - No. 6, Jan. 15, 1967, Page 507.

III

Defendant further moves to suppress any evidence obtained as a result of a search of a 1960 Dodge automobile owned by the defendant, Chester J. Dombrowski, and located on the Bernard J. Dombrowski farm in Fond du Lac County, which search was made pursuant to a search warrant.

The 1960 Dodge was owned by the defendant, Chester J. Dombrowski, and, at the time application for a search warrant was made it was located on the Bernard J. Dombrowski farm off the northwest corner of the barn about 75 feet and about half a block from the farmhouse, apparently outside the curtilage of the farm buildings.

At the time of the application to the County Judge of Branch II of the Fond du Lac County Court for a search warrant for the 1960 Dodge, it was established that a body had been found in Fond du Lac County on the Bernard J. Dombrowski farm; that the Dodge was owned by Chester J. Dombrowski, who, at the time, was under arrest in Washington County for operating an automobile while intoxicated. Undersheriff Raymond J. Howard also testified before Judge McEssy in Branch II of the County Court as follows, Page 2 of the transcript of the record made before the Honorable Hazen W. McEssy, County Judge, Branch II, Fond du Lac County Court:

QUESTION: Why do you want to examine this automobile or search it?

ANSWER: Because a man by the name of Chester Dombrowski had an accident just south of the Fond du Lac County line last night in which Washington County arrested him for drunken driving; and in so arresting him, they searched the car, and they found the floormat from the back of a Dodge car filled with blood and a raincoat, and a combination penknife and letter-opener, and while questioning the subject in Washington County, he demanded an attorney and said he would then give a statement.

Afterwards, he would not give a statement, but the attorneys made remarks that there would be a body found on the brother's farm, which is located in Fond du Lac County.

QUESTION: Brother of who?

ANSWER: Brother of Chester Dombrowski.

It appears to this Court that the evidence presented to County Judge Hazen W. McEssy at the time of seeking a search warrant for the 1960 Dodge was within the personal knowledge of Undersheriff Raymond J. Howard or based upon reliable information obtained by him from the Washington County authorities. The facts and circumstances related to Judge McEssy certainly were sufficient to convince him that there may be instruments or other articles which may have been used in the commission of a crime or may constitute evidence of a crime contained in this 1960 Dodge that may reasonably reveal some association with the dead body of Herbert L. McKinney. Judge McEssy, in granting this search warrant, was relying upon more than mere conclusions, suspicions or beliefs on the part of Mr. Howard. All of the facts and circumstances established probable cause for the issuance of the search warrant for the 1960 Dodge.

The search warrant set the limits of the search and required the searching authority to make return to a judicial officer. This was not a search without a warrant but rather a situation where we have the deliberate impartial judgment of a judicial officer finding probable cause, and interposing between the citizen and the police in making the determination as to whether or nor the search should be made.

It is, therefore, ordered that the defendant's motion to suppress evidence obtained as a result of the search of the 1960 Dodge owned by Chester J. Dombrowski, pursuant to a search warrant legally issued and complied with, be denied.

State vs. Baltes, 183 Wis. 545. State vs. Brockman, 231 Wis. 634. Krause vs. State, 226 Wis. 383. Aguilar vs. Texas, 378 U.S. 108. Biondo vs. U.S. 348 Fed. 2d, 272.

I V

The defendant further moves to suppress any evidence as a result of a search of the Thunderbird automobile located in Washington County at the time of the issuance of the search warrant to search said vehicle.

It is undisputed that the search warrant was issued by Judge McEssy in Branch II of the County Court of Fond du Lac County, and that the Thunderbird automobile at the time was located at a garage parking lot in the City of Kewaskum, Washington County. The defendant contends that the search warrant for the Thunderbird was illegal for the reason that it went beyond the Fond du Lac County boundary and that the search actually took place outside of Fond du Lac County. Chapter 963 of the Wisconsin Statutes does not specifically spell out that the search warrant is restricted to the county in which the same may be issued; but, in Section 963.03 (2) said section specifically authorizes the issuance of a search warrant in one county for search in another county for situations and circumstances therein set forth.

It is accordingly this Court's conclusion that the Legislature fully intended, in the absence of spelling out exceptions thereto, that the search warrant be used within the county where the premises or property is located and where the search warrant is obtained. This question was raised in *Ashley vs. Peterson, 25 Wis. 621,* but was not resolved, and this Court has found no authority to the contrary authorizing the issuance of a search warrant in one county for search in another county.

It is accordingly the order of this Court that the defendant's motion to suppress evidence obtained as a result of the search of the Thunderbird located in Washington County, pursuant to a search warrant illegally issued, be, and the same is hereby, granted.

V

The defendant further moves to suppress any evidence as a result of a search of the farm residence, owned by Bernard J. Dombrowski and located in Fond du Lac County, pursuant to a search warrant. The record herein discloses that the farm residence and farm property was owned by Bernard J. Dombrowski and that he had tenants in the farm residence but reversed unto himself a separate room. It is indicated by the record that Chester J. Dombrowski had no proprietary rights in this farm residence but apparently was a permissive visitor of his brother in using the room reserved for Bernard J. Dombrowski.

At the time of application for the search warrant, Officer Daniel R. Sondergard gave testimony before the Honorable Hazen W. McEssy in Branch II of the County Court,

and at that time the Court was apprised of the fact that a dead body had been found on the farm; and, in conducting a reasonable search and inquiry after finding said body in the area of the dump, application was made for the search of a 1960 Dodge located on the farm and also application for a search of the premises. Officer Sondergard testified that he looked through the window of the room reserved for the Dombrowskis and saw what would appear to him to be blood stains and some rocks or stones sitting on a table and a box of shells.

It is related in the record in the application for the search warrant that at the time and from the cursory observation of the McKinney body that these items might very well have been used in the commission of a crime in causing the death of McKinney.

There is little doubt but what the information related in the application for the search warrant was gained by peering through the window. This matter, however, was discussed extensively in *Edwards vs. State, 38 Wis. 2d 332,* wherein arrest was made without a warrant. In the case at hand, Sondergard returned to the Court and sought a search warrant before entering the premises of Bernard J. Dombrowski. It may very well be argued that these observations made by Sondergard constituted a search. It is true that a search can be conducted by one's eyes alone. However, as stated in the Edwards case, supra:

> "A search implies a prying into hidden places for that which is concealed. It is not a search to observe what is in plain view. Even though visual surveillance of things within plain view may be regarded as a search the real issue to be settled is whether or not such

activities are regarded as an unreasonable search as circumscribed by either the Fourth Amendment of the United States Constitution or Art. I, Sec. 11 of the Wisconsin Constitution."

It is further stated in the Edwards case that:

". . . whether or not a search or investigation is reasonable is not a matter for the application of the comparatively rigid rules of tort and property law, but is rather a matter of an inquiry as to whether the search or investigation is constitutionally reasonable under the circumstances. If police conduct is not considered unreasonable in the circumstances, it is not made unreasonable if it is deemed to have involved a civil trespass."

Considering what this Court has heretofore stated in determining other issues involved in the defendant's motions, and all of the facts and circumstances here involved, this Court concludes, as did Judge McEssy, that the police conduct in peering into this particular room on the Dombrowski property was not an unreasonable invasion of the defendant's, Chester J. Dombrowski's, rights.

It is, therefore, ordered that the defendant's motion to suppress evidence obtained as a result of the search warrant for the premises of Bernard J. Dombrowski be denied.

This case is scheduled for jury trial before this Court on July 8th, 1968, commencing at 9:30 a.m. In view of the fact that a jury is to be selected, this Court is taking the precaution of causing this order to be stamped filed by the Clerk of this Court and impounded by said Clerk so that the same is not released to the public or news media prior to the completion of the selection of the trial jury in this proceeding. Copies of this determination and order, however,

are being sent to counsel, and it is expected that they will treat the information contained herein in accordance with the Court's foregoing expressed intention.

Dated: June 18, 1968.

BY THE COURT:

/s/ Jerold E. Murphy
JEROLD E. MURPHY,
Acting County Judge

MEMORANDUM DECISION ON MOTIONS AFTER VERDICT. Filed in Fond du Lac County Court on August 1, 1968.

COUNTY COURT
BRANCH No. II

STATE OF WISCONSIN FOND DU LAC COUNTY

STATE OF WISCONSIN,)
Plaintiff,)
)
-vs-)
CHESTER J. DOMBROWSKI,)
Defendant.)

The jury duly impaneled in the above-entitled action returned a verdict on July 18th, 1968, wherein they found the defendant, Chester J. Dombrowski, guilty of murder in the first degree as charged in the indictment returned by the Grand Jury of Fond du Lac County. Thereafter, the Court scheduled motions after verdict to be held on July 25th, 1968.

The State, through the District Attorney of Fond du Lac County, Alexander P. Semenas, in its motion after verdict, moved the Court for entry of judgment upon the jury verdict finding the defendant guilty of first degree murder.

The defendant, through his attorneys, David E. Leichtfuss and Robert N. Gordon, moved the Court for entry of an order dismissing the above-entitled action and for a judgment of acquittal notwithstanding the jury verdict, or in the event the aforesaid motion is denied, for the entry of an order setting aside said verdict and granting to the defendant a new trial, and as grounds therefor asserts the following:

1. The Court erred in denying the defendant's motion for a dismissal of the action at the close of the State's case.

2. The Court erred in denying the defendant's motion for a dismissal of the action at the close of all testimony.

3. The Court erred in admitting into evidence physical evidence obtained as the result of official illegality and in violation of defendant's constitutional rights.

4. The Court erred in permitting Attorney Clyde Schloemer to testify as to the content of a conversation he had with the defendant.

5. The Court erred in denying defendant's motion for a mistrial immediately following highly inflammatory and grossly prejudicial remarks made by the District Attorney in his closing argument.

6. There was not sufficient credible evidence adduced upon the trial to support the finding by the jury that the defendant was guilty beyond a reasonable doubt.

7. In the interests of justice.

As to defendant's alleged error in items 1 and 2 listed above, suffice it to say that during the course of these proceedings and at the conclusion of the State's presentation, defendant moved for dismissal of the action which the Court denied at that time without comment. At the conclusion of all of the testimony, the defendant moved for dismissal of the action which the Court again denied without supplemental comment. This Court having heard all of the evidence in this proceeding, and reviewing the multitude of exhibits received, came to the conclusion at the time of the conclusion of the State's case and at the conclusion of all of the evidence that regardless of the fact that considerable amount of the evidence, facts and circumstances surrounding the material aspects of this case were circumstantial in nature, that the cumulative effect of the circumstantial evidence led this Court to conclude beyond a reasonable doubt that the defendant committed the crime with which he was charged. A more serious aspect, however, arose as to whether or not the venue of the offense with which the defendant was charged properly occurred in Fond du Lac County. Here the Court considered Section 956.01 of the Wisconsin Statutes, and was convinced, from the testimony presented, beyond a reasonable doubt, though phases of that testimony were also circumstantial, that either the defendant shot the decedent, Herbert L. McKinney, in Fond du Lac County or that he inflicted a wound which caused the death of Herbert L. McKinney in Fond du Lac County.

In its instructions to the jury, the Court submitted Section 956.01, Sub. 1, Sub. 3, and Sub. 4, and instructed said jury that venue, which is the legal term for the place of trial, must be proved beyond a reasonable doubt. This instruction was given in the exact form requested by the defendant.

It is significant that Doctor Robert E. Carlovsky, the doctor who performed the autopsy on the decedent's body, in addition to much other cumulative evidence, testified that a body does not bleed after it is dead. Once the heart action stops, the blood does not pump out. He stated that from the nature of the wound here inflicted upon McKinney that he did not think that McKinney lived more than one hour. He testified to a reasonable degree of medical certainty that when there is an injury to a body, such as the case at hand, the body will try to preserve its functions — especially in the heart and the brain; and, therefore, it will pump blood, if there is bleeding, from any site to the brain and to the heart to keep these vital organs going. So long as there is blood enough to do this, the patient will stay alive. When you have pumped out or lost all of the blood, the heart will stop functioning, and the patient is dead.

In the case at hand, the 1960 Dodge found on the Dombrowski farm disclosed extensive blood on the back seat, back rest, back of the front seat, on the floor mat, drippings down to the framework of the automobile and that this blood was Type "O" which matched the decedent, Herbert L. McKinney's blood typing, and as testimony subsequently revealed, was different than the defendant's blood type, which was Type A Positive.

The doctor was further asked as follows:

Q Based upon your observations of the autopsy that you performed in the evening of September 12th, 1967, do you have an opinion as to the time of death of this individual?

A Yes, I do.

Q What is that opinion?

A My estimation was the person had been dead 40 hours prior to the time I started — 11:00 p.m. on the 12th, plus or minus 6 hours.

Q How did you reach such a conclusion, doctor?

A This was based on the external examination of the body and microscopic findings on the tissues and the gross impressions of the internal tissues, also.

According to the doctor's testimony, this would place the time of death at approximately 7:00 a.m. on September 11th, 1967, plus or minus 6 hours.

This Court was convinced beyond a reasonable doubt, and apparently the jury came to the same conclusion, that the decedent was not only shot in the 1960 Dodge located in Fond du Lac County but also died in the 1960 Dodge located in Fond du Lac County, thus establishing venue beyond a reasonable doubt, though based upon circumstantial evidence, and also establishing from the cumulative circumstantial evidence received that the defendant committed the offense with which he was charged, and that the proofs establish such fact beyond a reasonable doubt.

The defendant's third allegation of error is relative to admitting into evidence physical evidence obtained as a result of an official illegality and in violation of the defendant's constitutional rights. From a review of the exhibits, this is primarily directed at the search of the 1960 Dodge pursuant to a search warrant and the search of the Thunderbird automobile. Here the Court refers the present reader to its decision of June 18th, 1968. There appears to be no useful purpose in repeating the Court's decision of June 18th, but that certain evidentiary facts presented to the Court during the course of this trial, particularly the testimony of Officer Weiss of the Washington County Police Department, supplements the testimony taken at the time of the motion to quash evidence brought by the defendant. The testimony here in summary form was to the effect that the Washington County Police were advised that there had been an accident in the vicinity of Kewaskum involving a 1967 Ford Thunderbird. The police proceeded to Kewaskum and found the defendant in a tavern at Kewaskum, and then proceeded with the defendant to the scene of the accident. The police called a wrecker which arrived at the scene of the accident while the officers were still there in the presence of the defendant, and the Thunderbird was subsequently towed to Honeck's Garage where it was placed on a lot outside of said garage. The Washington County Police then took the defendant to the Washington County Jail where he was placed under arrest for operating an automobile while under the influence of intoxicating liquor at or about 11:58 p.m., September 11th. After the exchange of some information during the course of which the defendant, Dombrowski, identified himself as a Chicago policeman, the defendant was hospitalized; and

then, at or about 2:23 a.m., Officer Weiss returned to Kewaskum to, as he stated, "look for the defendant's service revolver."

There appears to be no question but that the arrest of Dombrowski by the Washington County Police for operating an automobile while under the influence of intoxicating liquor was a bona fide arrest; that the defendant, Dombrowski, at that time was under police custody and in no position to look after the welfare of his property that had been involved in the accident, namely the Thunderbird and other personal items that he may or may not have had in said vehicle. The Washington County Police believed that a metropolitan policeman off duty carries a revolver, and they did look in the Thunderbird for the revolver. However, there was no evidence of this being an exploratory search by the officer for any reason other than to secure items of a personal nature that may have been in the wrecked automobile, and parked outside at this time, for the general benefit of the defendant, Dombrowski. It is significant at this point that when Officer Weiss made the search of the Thunderbird that he had no information whatsoever that the defendant, Dombrowski, was involved in any violation of the law other than the operating an automobile while under the influence referred to above, and that the only motivation of Officer Weiss in searching the Thunderbird was to safeguard the defendant's property during the period of time that he may be hospitalized or in official custody and unable to look after the same himself.

It appears to this Court that the conduct of Officer Weiss was exactly what good police procedures require for the protection of the great mass of citizenry, and, in this particular case, the defendant himself, at the time that Weiss

made the search. The fact that other evidence during the course of this search was found that subsequently involved the defendant in a more serious offense does not in and of itself violate the defendant's constitutional rights. In this Court's opinion, the conduct of the officer seems to be one of reasonableness, for he was not at the time of searching the automobile looking for any incriminating evidence, but was following what he termed to be a standard operating procedure in police work relative to safeguarding the property of Dombrowski.

It appears to this Court that if the search of the automobile by Weiss when he was not looking for any incriminating evidence whatsoever, but apparently only securing the property of a person lawfully under arrest is to be held illegal, then the rights of the great mass of citizens that may be involved in accidents or stalled vehicles, etc. will probably be jeopardized. To say that police can legally take custody of an automobile and tow it off the highway when it is involved in an accident and assume no responsibility for the automobile or its contents would appear to be contrary to the great public interests of the citizens of this state, and to say that if they do take custody of such a vehicle and then, during the course of a routine inventory or inspection of said vehicle, when they are looking for no criminal evidence whatsoever, discover criminal evidence or contraband, and because the evidence is criminal or contraband, then taint said search of the vehicle with illegality, would be illogical and arrive at a ridiculous legal conclusion. The fact is that under these circumstances the search of vehicles in the same or similar circumstance is not in an of itself unreasonable, but rather protective. When an article lawfully comes into the officer's

possession in the course of such a lawful search, without a warrant, it would be entirely without reason to say that it would be illegal to use the same at a subsequent prosecution because it was not one of the things it was his business to look for or he didn't have a search warrant at the time that he made the search. As a matter of fact, this Court determines that despite the time lapse involved that the search here was incidental to the arrest for operating an automobile while under the influence of intoxicating liquor, and was the same procedure as inventorying personal property the defendant may have upon his person at the time he may be taken into custody. It is accordingly the Court's determination that the search of the Thunderbird by Officer Weiss was a legal search and that the evidence produced as a result therefrom was properly admitted and considered in the course of these proceedings.

It is further argued in the fourth item set forth above that the Court erred in permitting Attorney Schloemer to testify as to the content of a conversation he had with the defendant on the ground of attorney-client relationship, the same being a privileged communication pursuant to Wisconsin Statutes. Here the Court guided itself by a Court order in State ex rel. Clyde J. Schloemer, Petitioner, v. The County Court, Branch II of Fond du Lac County, the Honorable Hazen W. McEssy Presiding, Respondent, wherein the Wisconsin Supreme Court on March 8th, 1968, in response to Attorney Clyde J. Schloemer's petition for a writ of prohibition, directed that three questions could be asked, and they were asked in the form that the Supreme Court order had directed: 1. "Did Mr. Dombrowski indicate to you that he wanted a communication made to a third party?" In response to the foregoing question, Attorney Schloemer answered in

the affirmative; then, in accordance with the Supreme Court directive of March 8th, the following questions were asked of Attorney Schloemer: 1. "What was the content of the message that Mr. Dombrowski wished to have communicated to a third party?" 2. "To whom was the message to be communicated?"

This Court considers that to the extent indicated above that Attorney-client relationship had been waived by the defendant, Dombrowski, and that the foregoing questions were properly asked during the course of this proceeding, and the same did not constitute error.

The defendant's fifth ground for error alleged above refers to highly inflammatory and grossly prejudicial remarks made by the District Attorney in his closing argument.

During the course of the rebuttal argument, the District Attorney in referring to Mr. Schloemer's testimony, stated as follows: "I've got something to tell you," he infers it. What happens after that? What do they find as a result of that? They go out and they find this body. Who knows where it is at? One person . . . at that time . . . one person . . . and that person is seated at that table there. (Pointing). No one else. Mr. Leichtfuss inferred about the .38 caliber. Why, yes, there are different manufacturers. Simple way to answer this — Mr. Mauer gave it to us — All the defendant had to do was produce the gun."

Immediately after the foregoing, objection was made as unfair argument. At that point the Court instructed the jury that they were admonished to disregard that phase of the argument on behalf of counsel and that counsel was not to repeat any phase of that argument as to what the defendant may have been called upon to produce.

The District Attorney then continued his rebuttal argument, and at one phase near the close of the argument, referring to the defendant, stated: "He is vicious and violent, and ought to be exterminated. It is up to you to do your job. We have done ours. We have done that. This person has to be taken care of, and I believe it is your duty to do so." As to this last phase of the argument, counsel for the defendant did not make any objection, though he has at a later point on the motions after verdict referred to the same. Nevertheless, the Court at the conclusion of the District Attorney's rebuttal argument stated as follows: "We will take a recess at this time. The Court wants to again admonish the jurors that the statement of the District Attorney relative to the defendant producing anything whatsoever in this proceeding is improper, and the Court at that time instructed the District Attorney it was improper. I admonish you to disregard it, and you are to draw no inferences whatsoever. You are to completely disregard that, and I want to impress upon you that the defendant is under no obligation in any criminal proceeding to produce anything. We will take a recess now after which the Court will instruct the jurors."

Then, during the course of instructions at the phase in which the court was instructing the jury relative to considering closing argument of counsel, the Court again repeated: "It is your duty to draw your own conclusions and your own inferences from the evidence, and to decide upon your verdict according to the evidence, under the instructions given you by the Court. In that respect, I admonish you that during the rebuttal argument of the State that certain improper statements were made by the District Attorney — and you were asked at the outset of this trial whether you subscribed to

the theory that it was the responsibility of the State to prove a defendant guilty; and, then, under no circumstances, does it ever shift to where the defendant has to prove his innocence in any way whatsoever. I admonish you to completely disregard the statement that was objectionable." The form instruction was given relative to argument of counsel and the jury was also advised "that closing arguments of counsel and their conclusions and opinions are not to be considered by you as evidence in this case."

This Court is of the opinion that though the argument of the District Attorney may have been improper that the error, if any, was immediately corrected by the Court, and that the jury responded on the voir dire, and in their attention to the Court's admonitions to disregard the improper argument they did so in their deliberations. This Court does not feel that the comment of the District Attorney, when properly corrected by the Court, prejudiced the defendant in this proceeding.

As to items 6 and 7 set forth in the defendant's motions above, this Court is of the opinion that sufficient credible evidence adduced upon the trial of this case was presented to support the jury's finding that the defendant was guilty of first degree murder beyond a reasonable doubt, and this Court is further convinced that justice has prevailed throughout this trial.

It is accordingly the determination of this Court that the defendant's motions after verdict be, and the same are, denied, and it is the judgment of this Court that the defendant be adjudged guilty of having on the 11th day of September, 1967, in the Town of Auburn, County of Fond du Lac, State of Wisconsin, feloniously and with intent to kill, cause the

death of another human being, to-wit: Herbert L. McKinney, contrary to Section 940.01 of the Wisconsin Statutes, and against the peace and dignity of the State of Wisconsin.

Dated: August 1, 1968.

BY THE COURT:

/s/ Jerold E. Murphy
JEROLD E. MURPHY,
Acting Judge,
County Court Br. II
Fond du Lac County, Wisconsin

TESTIMONY OF WILLIAM WEISS, from Exhibit C, Transcript of Proceedings of Trial in Fond du Lac County Court.

[30] WILLIAM WEISS, called as a witness herein on behalf of the State, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION By Mr. Semenas

Q. Please state your name? A. William Weiss.

Q. Where do you live? A. Allenton, Wisconsin.

Q. What is your occupation? A. Traffic officer with the Washington County Sheriff's Department.

Q. Were you a traffic officer for Washington County on Monday, September 11th, 1967? A. Yes, sir, I was.

[31] Q. Do you recall what hours you were on duty on Monday, September 11th, 1967? A. 7:00 p.m. until 4:00 a.m.

Q. While on duty on September 11th, 1967, did you have any occasion to go into the area near Kewaskum?

* * *

A. Yes, sir, I did.

* * *

[32] Q. When you went into the area of Kewaskum, what did you see, or what did you do? A. My partner and I went to the Village of Kewaskum; I was driving the police car, and I parked it on Main Street facing north on the right-hand side of the road, which should be the east side.

Q. And by your partner, who do you mean? A. Officer Bruce Boudry.

Q. What did you do after you parked the vehicle? A. I remained in the vehicle.

Q. And what else took place? What did you observe then? A. I observed Officer Boudry get out of the car and go to the opposite side of the road into a tavern.

Q. Did you make any other observations after you observed Officer Boudry go into the tavern? A. A few moments later he came out, and he went into another tavern on the same side of the street we were parked on.

Q. What other observations did you make after you observed him crossing the street again? [33] A. He went into the tavern on the same side of the street I was parked on.

Q. What is the name of that place? A. Glacier Inn.

Q. What observations did you make after he went into the Glacier Inn? A. Few moments later he came out with the subject and brought him to the police car.

Q. And the first person that was brought to the police car in the evening of September 11th, 1967, do you observe him in the courtroom at this time? A. Yes, sir, I do.

Q. Where is he seated? A. Seated over there at the defendant's table.

* * *

Q. What took place after Officer Boudry and the defendant, Mr. Dombrowski, came to the squad car? A. Mr. Dombrowski got into the right rear seat of the police car, [34] and Officer Boudry got into the right front seat, and we drove out to the scene of the accident.

Q. And where is the scene of this accident you drove to? A. North of Kewaskum right near the bridge at the Fond du Lac-Washington county line; just inside Washington County.

* * *

Q. Mr. Weiss, when was the defendant, Mr. Dombrowski, placed under arrest? A. At the Sheriff's Office in West Bend.

Q. What observations did you make after you arrived at the scene of the accident on September 11th, 1967? A. On the east side of the road, off of the road, there is a little driveway leading down to the embankment. There was a guardrail broken off; looked like it was in an L-shaped form, broken form, and there was a car down below.

Q. What type of vehicle was this that you observed on the evening of September 11th, 1967? A. A Thunderbird car with Illinois license plates on it.

[35] Q. What did you do after you made the observations at the scene of the accident? A. I remained in the police car with the defendant.

Q. What took place after that? A. I asked the defendant for his license and identification, and Officer Boudry went down and took the measurements of the scene of the accident.

Q. After your investigation of the accident scene was completed, what did you do? A. The three of us went back to the Sheriff's Office in West Bend.

Q. Did you observe the damage to the Thunderbird? A. No, sir, I didn't; I didn't get out of the car.

Q. You stated you returned where after your observations at the scene of the accident? A. We returned to the Sheriff's Office in West Bend.

Q. And what did you do after you arrived at the Sheriff's Office in West Bend? A. We talked to the Assistant District Attorney, Aldwin Seefeldt.

Q. Was the defendant, Mr. Dombrowski, present at this time? A. Yes, sir, he was.

Q. Who else was present? A. Myself, Officer Boudry, and the Assistant District Attorney, Aldwin Seefeldt.

Q. What took place at the Sheriff's Office in West Bend? A. Mr. Seefeldt asked Mr. Dombrowski —

* * *

[36] A. Mr. Seefeldt asked Mr. Dombrowski who he was —

* * *

A. Mr. Seefeldt asked Mr. Dombrowski who he was and if he was a member of the Chicago Police Department.

Q. What took place after that statement? A. I stayed in the line-up room with Mr. Dombrowski. Officer Boudry and Mr. Seefeldt stepped out of the room for a few moments.

Q. Continue, and relate what took place in the Sheriff's Department after that that you observed — your personal observations? [37] A. Mr. Dombrowski and myself were in the line-up room for a few seconds alone; Mr. Seefeldt came back in and advised us to treat Mr. Dombrowski as we would any other citizen and charge him with drunken driving.

* * *

Q. Was Mr. Dombrowski charged with any violation? A. Yes, sir, he was charged with drunken driving.

* * *

Q. Relate what happened after you charged Mr. Dombrowski with drunken driving? A. We took him to the West Bend Police Department for a breathalyzer test.

Q. By "We," who do you mean? A. Officer Boudry and myself.

Q. And what took place then after you took him to the West Bend Police Department? A. There an officer from the West Bend Police Department administered a "chem" test

[38] Q. Relate what took place after you arrived at the West Bend Police Department? A. The officer from the West Bend Police Department and myself and Officer Boudry took Mr. Dombrowski into the testing room to give him a "chem" test, which he refused to take.

Q. What else took place? A. Mr. Dombrowski continually told us he was a Chicago policeman —

* * *

Q. Continue with your observations that you made? A. Mr. Dombrowski was what I would call in a drunken state; his talking was slurred, and he continually begged if we couldn't forget about this matter, being he was a member of the Chicago Police Department, and any type of traffic violation would mean his automatic dismissal from the force in Chicago. He stated that if we would forget —

* * *

[41] Q. Did you make any other observations at the West Bend Police Station on the evening of September 11th, 1967, when the defendant, Mr. Dombrowski, was in your presence? A. I noted that he was, to the best of my knowledge, in a drunken condition; that he was incoherent at times, * * *.

* * *

Q. What took place after the tests were completed at the West Bend Police Station on the evening of September 11th, 1967, when the defendant, Mr. Dombrowski, was present? [42] A. Mr. Dombrowski, Officer Boudry, and myself went to St. Joseph's Hospital in West Bend.

Q. And what took place after Officer Boudry and yourself and the defendant, Mr. Dombrowski, went from the West Bend Police Station to the hospital at West Bend? A. Mr. Dombrowski was examined by a nurse as to his physical condition.

Q. Were you present at this time? A. Yes, sir.

Q. What did you observe in this examination that took place of the defendant, Mr. Dombrowski, on the evening of September 11, 1967? A. Mr. Dombrowski was laying on the examination table — I observed blood on the front of his shirt and a little blood around his nose, and the nurse examined him for any injuries.

Q. What did you do after you made these observations? A. We asked for — asked the nurse if she would call a doctor.

Q. Was a doctor called? A. Yes, sir, he was.

Q. What took place after this call was made to this doctor? A. Doctor Sorensen then came to the hospital at West Bend and examined Mr. Dombrowski.

Q. Were you present when Doctor Sorensen examined the defendant, Mr. Chester Dombrowski, on the evening of September 11th, 1967? A. Yes, sir, I was in the room.

[43] Q. What observations did you make when you observed the examination of the defendant, Mr. Dombrowski, by Doctor Sorensen on the evening of September 11th? A. When the doctor started to examine Mr. Dombrowski he was laying on the table on his back, and his left leg started to shake heavily; he tipped his head back, and when the doctor asked him a question, he pointed to his mouth with his right hand and made noises; he did not answer any questions, and he continued to shake and make noises out of his mouth.

Q. What took place after you made these observations when the doctor was examining the defendant, Mr. Chester Dombrowski, on the evening of September 11th, 1967? A. The doctor examined him as best as he could, and he said, to the best of my knowledge —

* * *

A. The doctor stated that to the best of his knowledge the defendant just suffered from a nosebleed — or a bump on his nose to cause the nosebleed, and that he was just good plain drunk.

[44] Q. And what took place after the doctor made this statement to you on the evening of September 11th, 1967? A. The doctor then took a sample of the defendant's urine.

Q. What room in the hospital was this examination made? A. In the Emergency Room on the third floor, St. Joseph's Hospital in West Bend.

Q. And after this urine sample by the doctor of the defendant was taken, what took place? A. The doctor stated that the defendant may be suffering from some type of disease that he wasn't aware of that was causing him to shake or not be able to speak, so he thought it would be best if he could call the defendant's wife and find out if he would be able to give further treatment to him.

Q. And what happened after this statement was made by the doctor? A. The doctor and myself went down into the office of the hospital, and we called the defendant's wife.

* * *

[45] Q. Did you have any conversation on the phone with anyone?

* * *

A. Yes, sir, I did.

* * *

Q. What took place, Officer Weiss, after this phone call was made to this party in Chicago? A. The doctor and myself went upstairs again, and I received a telephone call from the Assistant District Attorney, Aldwin Seefeldt, * * *

* * *

Q. What took place after you received the phone call from the Assistant District Attorney, Mr. Seefeldt? A. Mr. Dombrowski was moved to a room in the hospital. Officer Boudry was assigned to guard Mr. Dombrowski while he was staying in the hospital.

Q. What did you do after this took place? [46] A. I left the hospital, and I drove up to Honeck's Garage in Kewaskum.

Q. Why did you drive up there?

* * *

A. I drove up to Honeck's Garage because the fact had been established that Mr. Dombrowski was indeed a member of the Chicago Police Department; and, in our search of the subject, of the defendant, we did not find his revolver on him, and we are under the assumption, or we have been told, members of the metropolitan police departments are —

MR. LEICHTFUSS: Objection as to anything that was told by people outside —

THE COURT: Sustained as to what you have been told in that respect. That may be stricken, and the jury is instructed to disregard it.

MR. SEMENAS:

Q. What did you do after you went to Honeck's Garage?
A. I looked in the car that the defendant had rented.

Q. Did you find anything in this rented car?

MR. LEICHTFUSS: May it please the Court, at this point in time, I have some voir dire examination I would request of the Court of this witness in the absence of the jury.

[47] THE COURT: All right, you may take the jury out, please.

Whereupon the jury retired from the courtroom and the following proceedings were had in the absence and outside the hearing of the jury:

MR. LEICHTFUSS: Judge, what I am attempting to do by inserting the request at this time is to advise the Court that on the basis of our former hearing and a ruling by the Court, this is one of the officers from Washington County who was about to be asked questions with reference to a search of a vehicle in Washington County. We submit that unless it is clearly established that there are reasonable grounds for this that this testimony should not be heard by the jury, and we, therefore, would request this privilege of voir diring this witness in the absence of the jury so that the Court's decision, based on the testimony, is not based on testimony heard by the jury unless the Court so holds.

THE COURT: What do you have here that you didn't have in your motion to quash?

MR. LEICHTFUSS: The officer.

THE COURT: He was available to you at that time, wasn't he? Wasn't the burden upon the parties bringing the motion?

MR. LEICHTFUSS: The Court recited in its decision, on the basis of the evidence produced, that the original search of the Thunderbird was a routine police procedure.

THE COURT: What page?

[48] MR. LEICHTFUSS: Page 3, your Honor. "That the original search of the Thunderbird was a routine police procedure, when they were charged with the responsibility of safekeeping of the defendant's property pending his release and return of his property to him." We contend there is no establishment of that fact, and that while —

THE COURT: You mean at the time the testimony was taken on the motions?

MR. LEICHTFUSS: Correct.

THE COURT: No establishment of that fact?

MR. LEICHTFUSS: No establishment in that record that shows any responsibility on the part —

THE COURT: Show me in the record.

MR. LEICHTFUSS: I don't have a record, Judge; I don't have a transcript of the proceeding. Then a recent Supreme Court case came down between the time of this motion, your Honor, and today, which I would like to direct the Court's attention to and respectfully submit that with this information, plus what I have considered to be this officer's testimony that there is no establishment of a basis for the search of this 1967 Ford Thunderbird; so, in effect, we are renewing the motion to suppress.

THE COURT: I read the case you are referring to.

MR. LEICHTFUSS: Which one?

THE COURT: In the last advance sheets.

[49] MR. LEICHTFUSS: Dyke vs. Taylor Implement Co?

THE COURT: There was some guy by the name of "Pee Wee" and — I remember it more by that than by name. You may proceed with your voir dire examination.

EXAMINATION By Mr. Leichtfuss

Q. It is a fact, is it not, that when you went back out to the scene of this accident, you looked in the automobile that you have described as a 1967 Ford Thunderbird; isn't that true? A. Yes, sir, that's right.

Q. When you were searching that vehicle, you had no search warrant, did you? A. No, sir.

Q. And you did not have the consent of the defendant, did you? A. No, sir, we did not. I did not.

Q. What time was it that you went back out to the scene of the accident? A. From memory I would say 2:28 a.m.

Q. About 2:28 a.m.? What time was it that you had arrested the defendant? A. From memory I would say 11:58 or 11:57 p.m.

Q. You had removed the defendant from the scene of the accident, had you not? In other words, you took him out there, and then left the scene with the defendant? A. Yes, sir.

[50] Q. The car stayed there? A. No, sir.

Q. What happened to the car? A. We called a wrecker.

Q. You did? A. Yes, sir. We radioed to the Sheriff's Department to have them call a wrecker.

Q. And somewhere along the line you were advised the wrecker picked up the car and had taken it to the garage you described as Honeck's? A. No, sir.

Q. Somebody had to tell you where the car was? A. No, sir.

Q. You knew where the car was? A. Yes, sir.

Q. Somebody had to tell you that, didn't they? A. No, sir, the wrecker came to the scene of the accident while we were still there, and we observed the wrecker pull the car in.

Q. The car left the scene of the accident before you did? A. At the same time.

Q. You took the defendant to the West Bend Police Station eventually, and then subsequently to the hospital; is that correct? A. Yes, sir.

Q. So approximately two to two and a half hours later you went [51] back to the garage that the wrecker had come from, is that true? A. Yes, sir.

Q. And it was at that time you then looked into the automobile? A. Yes, sir.

Q. When you looked into the automobile you did not have — Strike that. Did you look into the trunk of the automobile? A. Yes, sir.

Q. Was it locked? A. Yes, sir.

Q. And you said that the defendant at this time was under arrest for drunken driving; is that right? A. Yes, sir, that's correct.

Q. Do you know if anybody from the Sheriff's Department remained with the automobile at all times? Do you know whether or not any sheriff did? A. Yes, sir, I know.

Q. You know that one did? A. I know that one did not.

MR. LEICHTFUSS: That's all, your Honor.

THE COURT: Mr. Semenas?

EXAMINATION By Mr. Semenas

Q. What was your reason for searching this car?

MR. LEICHTFUSS: The reason is immaterial as far as we are concerned.

[52] THE COURT: Overruled; he may answer.

THE WITNESS:

A. I was looking for the defendant's service revolver.

MR. SEMENAS:

Q. Did you find any articles in this car? A. Yes, sir, I did.

Q. Did you find any revolver? A. No, sir, I did not.

Q. Is this standard procedure in your police work?

* * *

THE WITNESS:

A. Yes, sir, it is standard procedure in our department.

MR. SEMENAS:

Q. Officer Weiss, after you made a search of this Thunderbird, 1967 Thunderbird, that was involved in the accident, what did you do? What did you find?

THE COURT: You don't have to go into that at this stage. No reason we can't go into that before the jury. I don't see anything that the defense brought forth that would vary the court's previous determination.

MR. LEICHTFUSS: May I cite a case?

[53] THE COURT: Better if you handed me the case than to read the quote.

MR. LEICHTFUSS: It is 88 Supreme Court, 1472. I respectfully direct the Court's attention to Page 1475. I have the following quotes from that case that I think are significant. They refer to the Preston Case, which the Court is familiar with, which holds, under such circumstances when a car search is conducted while the defendant is in custody, they held the search to be remote in time or place to be incidental to the arrest. The case is significant to these facts, in my judgment, which are new facts to this Court in that it has been established that this officer had the defendant in custody; they removed him to the police station, and it was some 2½ hours later at an independent garage that the search was conducted of a car that had not been retained in custody or control by the Sheriff's Department. Then I have reference from this case, and it is reference to the Cooper case — vs. State of California — which is the case I think this Court also is familiar with in which the police department in California had impounded a car pursuant to a statute when the car was

suspected of being involved in the transportation of contraband. The Supreme Court said under those circumstances that the police department then had a right to search the automobile which they had impounded pursuant to law. Their conclusion then is that to search cars without warrants require that the officers conducting the search have "reasonable or probable cause" to believe [54] that they will find the instrumentality of a crime before they begin their warrantless search. This officer's own testimony is he wasn't even looking for anything connected with the arrest for drunken driving. This was simply a vehicle belonging to a person in the custody of the West Bend, Washington County, Traffic Department, and they had gone out on a general exploratory search of a locked vehicle, and under the guise of looking for some service revolver which has nothing to do whatever with the offense for which this defendant was in custody. It is remote in time and with a warrant, and the defendant is clearly under arrest. So we contend anything obtained in that search is clearly contaminated and not admissible in court.

THE COURT: The Court's ruling will stand. Bring the jury back. The Court sees that nothing developed here this morning that it did not have before it at the time the motions were passed upon by the Court that would materially cause the Court to alter its determination.

Whereupon the jury returned to the courtroom at 10:15 a.m., and the following proceedings were had in the presence and hearing of the jury:

MR. SEMENAS: (Continuing) —

Q. What did you do when you arrived at Honeck's Garage in Kewaskum? A. I looked into the car.

[55] Q. What car? A. The car that the defendant was driving when he had the accident.

Q. What type of car was this that you searched? A. A 1967 Thunderbird.

Q. Do you recall what color this 1967 Ford Thunderbird was? A. No, sir, not offhand.

Q. What did you find when you searched the 1967 Ford Thunderbird, to the best of your recollection? A. On the floor of the front of the car —

MR. LEICHTFUSS: Excuse me. I want my objection noted in the record.

THE COURT: It is noted. Overruled. You may answer.

THE WITNESS:

A. On the floor in the front of the car on the right-hand side I found a Rules and Regulations Book of the Chicago Police Department. On the console — this was a car with twin seats — in between the two seats — there was a flashlight with a few spots of blood on it.

MR. LEICHTFUSS: I object to that conclusion unless it is shown this witness is in a position to determine what it was.

THE COURT: The objection is sustained. Sounded like a conclusion.

MR. SEMENAS:

Q. What did it appear to be? A. Blood.

[56] Q. And after you found this flashlight, then what did you do? A. I looked through the remainder of the inside of the car. I found nothing of any importance.

Q. Then what did you do? A. I then opened the trunk of the car.

Q. And did you find anything in there? A. Yes, sir, I did.

* * *

MR. SEMENAS:

Q. What did you find in this 1967 Ford Thunderbird that was at Honeck's Service Station in Kewaskum? A. Upon opening the trunk, I found a pair of what appeared to me to be uniform pants, blue in color, with a thin white stripe down the leg. I found a pair of casual pants, gray in color. I found a policeman's night stick with the name "Dombrowski" stamped on it.

Q. Dombrowski? A. "Dombrowski" was stamped on this policeman's night stick. I [57] found a raincoat which also appeared to me to be a uniform raincoat because it had a badge holder on the left-hand side near where your heart would be. I found a floor tarp, from what I assumed to be —

MR. LEICHTFUSS: We don't want assumptions. We object to the assumptions.

THE COURT: Objection sustained.

MR. SEMENAS:

Q. What did this appear to be, this floor mat? A. Floor tarp from the inside of a car.

Q. Do you recall, of your own knowledge, any other items? A. I found a box, cardboard box, in the car which had numerous items in. It had a penknife, undershirt, hotsheet from the Chicago Police Department —

Q. After you discovered these items, Officer, Weiss, what did you do? A. I took all the items I found in the trunk and in the car and put them in the trunk of my police car. I took them to the Sheriff's Office in West Bend.

Q. Why did you put these items in your police car?

MR. LEICHTFUSS: The "Why" is immaterial, your Honor.

THE COURT: Overruled. He may answer.

THE WITNESS:

A. All of the items that I mentioned previously had blood on them.

MR. LEICHTFUSS: We object to that. It is a conclusion on the part of this witness.

[58] THE COURT: Sustained.

MR. SEMENAS:

Q. What appeared to be on these items?

THE WITNESS:

A. Blood.

Q. And what did you do with these items after you placed them in your squadcar? A. I drove to West Bend, and I took them to the Sheriff's Office, and I locked them in the Detectives' Office.

Q. Why did this substance, in your mind, appear to be blood?

MR. LEICHTFUSS: That's immaterial, your Honor. We object to the form of the question.

THE COURT: Ask him to describe what he saw.

MR. SEMENAS:

Q. Describe what you observed on these items? A. The items were all saturated red.

THE COURT: What?

THE WITNESS: Saturated red in color.

MR. SEMENAS:

Q. In what state was this substance on these items? A. Some of it was dried and some of it was wet.

Q. Do you recall now which items were wet? A. The floor tarp still had a wet red substance on it.

Q. What did you do with these items after you placed them in your vehicle? A. Took them to the Sheriff's Office in West Bend, and I locked [59] them in the Investigators' Room.

Q. What did you do after you locked these items in the Investigators' Room? A. I then went back to the hospital.

* * *

(Recess taken at 10:23 a.m.)
(Jury retires from the courtroom)

* * *

[60] During said recess, the following exhibits were marked for identification by the court reporter as State's Exhibits:

1 — Uniform trousers
2 — Gray trousers
3 — Raincoat
4 — Night stick

5 — Cardboard box
6 — Hotsheet & Misc. papers
7 — Letter opener
8 — T-shirt
9 — Glove
10 — Coat hanger
11 — Rules & Regulations Book (Chicago Police)
12 — Plastic pail with towel inside
13 — Auto floor mat

The trial of the above-entitled matter was resumed pursuant to the recess last above noted at 10:50 a.m.; all parties present. Jury in box.

Mr. Weiss resumes the stand.

DIRECT EXAMINATION (Continuing) — By Mr. Semenas

Q. Officer Weiss, I now show you what has been marked as State's Exhibit 1 and ask you what this is? A. Pair of uniform pants — police uniform pants.

[61] Q. Have you seen these prior to this time? A. Yes, sir, I have.

Q. Where did you see them? A. I saw them in the trunk of the 1967 Ford Thunderbird.

Q. And when was this? A. At about 2:28 a.m. the morning of September 12th, 1967.

* * *

Q. Officer Weiss, I now show you what has been marked as State's Exhibit 2 for identification; could you tell me what this purports to be — what it appears to be to you? A. Pair of casual pants — sport pants.

Q. Have you seen these prior to this time? A. Yes, I have.

[62] Q. Where did you see this item? A. In the trunk of the 1967 Ford Thunderbird at Honeck's Garage.

Q. When was this? A. The morning of September 12th, 1967.

Q. Now, Officer Weiss, I show you what has been marked as State's Exhibit 3 for identification; could you tell me what this appears to be? A. Appears to be a raincoat.

Q. And have you seen that item prior to this time? A. Yes, sir, I have.

Q. And where did you see this item? A. In the trunk of the 1967 Ford Thunderbird.

Q. And on what date was that? A. September 12th, 1967.

Q. Now, Officer Weiss, I show you what has been marked as State's Exhibit 4 for identification; could you tell me what that purports or appears to be to you? A. A policeman's night stick.

Q. Have you seen that item prior to this time? A. Yes, sir, I have.

Q. Where did you see it? A. In the trunk of the 1967 Ford Thunderbird.

Q. Where? A. At Honeck's Garage.

Q. And what date was that? A. September 12th, 1967.

[63] Q. I now have Exhibits 5 through 10 inclusive; this is going to be difficult. Officer Weiss, I show you what

has been marked as State's Exhibit 5 for identification. What does this appear to be to you? A. A box. A cardboard box.

Q. And where did you see this box? A. That was in the trunk of the 1967 Ford Thunderbird at Honeck's Garage.

Q. When? A. September 12th, 1967.

Q. I show you what has been marked as State's Exhibit 6 for identification, and would you tell me what this appears to be to you? A. It appears to be a hotsheet from a police department.

Q. When did you first see these? A. When I looked in the trunk and found the box that was in a box.

Q. Where was this at? A. In the trunk of the 1967 Ford Thunderbird parked at Honeck's Garage on September 12th, 1967.

Q. Now, I show you what has been marked as State's Exhibit 7 for identification, and I ask you what this appears to be? A. Letter opener or a penknife.

Q. Have you seen this object prior to this time? A. Yes, sir, I have.

[64] Q. When did you first see it? A. I saw that in the box on September 12th, 1967, in the trunk of the 1967 Ford Thunderbird parked at Honeck's Garage.

Q. Now, I show you what has been marked as State's Exhibit 8 for identification, and would you tell me what this appears to be to you? A. Appears to be a white undershirt.

Q. And where did you first see this item? A. I first saw that item in the box in the trunk of the car, of the 1967 Ford Thunderbird, parked at Honeck's Garage on September 12th, 1967.

Q. Now, I show you what has been marked as State's Exhibit 9 for identification; would you tell me what that appears to be to you? A. Some sort of a glove.

Q. When did you first see this item? A. I saw that on September 12th, 1967 in the cardboard box in the trunk of the car parked at Honeck's Chevrolet.

Q. That's located where? A. Kewaskum, Wisconsin.

Q. Now, I show you State's Exhibit 10 that has been marked for identification and ask you what that purports to be? A. Coat hanger.

Q. When did you first see this item? A. In the early morning of September 12th, 1967.

Q. Where? A. In the cardboard box in the trunk of the 1967 Ford [65] Thunderbird parked at Honeck's Garage in Kewaskum, Wisconsin.

Q. Officer Weiss, now I show you what has been marked as State's Exhibit 11 for identification; would you tell me what that appears to be to you? A. A rules and regulations book of the Chicago Police Department.

Q. When did you first see that item? A. Early morning of September 12th, 1967.

Q. And where did you see this item? A. On the floor of the front seat of the 1967 Ford Thunderbird parked at Honeck's Garage, Kewaskum, Wisconsin.

Q. Officer Weiss, now I show you what has been marked as State's Exhibit 12; would you tell me what that appears to be to you? A. Plastic pail with a terrycloth towel inside.

Q. When did you first see these items? A. On September 12th, early morning of September 12th, 1967.

Q. Where did you see these items? A. That was in the trunk of the 1967 Ford Thunderbird parked at Honeck's Garage in Kewaskum, Wisconsin.

Q. Now, could you step down from the stand. (Witness leaves the stand). I show you what has been marked as State's Exhibit 13 for identification. Would you tell me what that appears to be? A. Appears to be a floor mat from a car.

Q. Have you seen this item previous to this time? A. Yes, sir, I have.

[66] When did you first see this? A. Early morning of September 12th, 1967.

Q. Where did you see this item? A. In the trunk of a 1967 Ford Thunderbird parked at Honeck's Garage in Kewaskum. (Witness returns to the witness stand).

Q. Officer Weiss, what did you do with the items marked Exhibits 1 through 13 for identification after you found them at Honeck's Garage? A. I put them in the trunk of my police car, and I took them to the Sheriff's Office in West Bend, and I locked them in the Investigators' Office.

* * *

CROSS-EXAMINATION By Mr. Leichtfuss

Q. Mr. Weiss, you say you are a traffic officer for Washington County, and were on September 11th, 1967? A. Yes, sir, that is right.

[67] Q. When did you start that job? A. April 1st, 1967.

Q. So you had been a traffic officer employed in that capacity since April of that year; is that right? A. Yes, sir, that is correct.

Q. And at the time, on the date of September 11th, 1967, you had been working the 7:00 p.m. to 4:00 a.m. shift? A. Yes, sir, that is correct.

* * *

[76] Q. Do you know who was driving the car when it got down there? A. The defendant told me he was.

[77] Q. When did he tell you that? A. On the way out to the accident scene.

Q. From Kewaskum? A. Yes, sir.

Q. Did he say that was the car he was driving? A. Yes, sir.

Q. Was he willing to have you take him out there and for him to show you the car? A. No, sir.

Q. Was he incoherent at this time? A. No, sir.

Q. Was he, in your opinion, intoxicated? A. Yes, sir.

Q. Did you have any reason to suspect that what he was telling you was not truthful? A. No, sir, I did not.

Q. In fact, with his assistance you arrived at the scene of this accident, didn't you? A. With his and the assistance of another party.

Q. But you got to the scene of the accident? A. Yes, sir, we did.

Q. How long did you stay out there? A. We arrived at the accident scene at 11:10 — at 11:33 we left the accident scene.

Q. When you left the scene of the accident, you say the car had been towed out of the area, but you observed it when you arrived; is that correct? [78] A. Yes, sir, that is right.

Q. So it was approximately three hours after you left the scene of the accident that you later went back and searched the automobile at Honeck's Garage; is that correct? A. It wasn't three hours.

Q. Well, I thought it was about 11:30 to 2:30, wasn't it? A. No, sir, it wasn't that long.

Q. What time did you leave the scene of the accident? A. 11:33.

Q. You said, didn't you, that you searched the car at approximately 2:28? A. That was without my notes, sir, that was a guess.

Q. What time was it? A. 2:13 a.m.

Q. So I am 17 minutes off or so, right? A. Yes, sir.

Q. Were you alone when you searched the car? A. Yes, sir.

* * *

TESTIMONY OF DR. RICHARD F. SORENSEN, from Exhibit C, Transcript of Proceedings of Trial in Fond du Lac County.

[85] RICHARD F. SORENSEN, called as a witness herein on behalf of the State, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION By Mr. Semenas

* * *

[86] Q. Would you continue as to what you recall from the early morning hours of September 12th, 1967? A. I received a phone call at my home I would say approximately 1:50 a.m. from the nurse in the emergency room at the [87] hospital, stating she had a man who was involved in an accident and was requesting medical care; and, since I was on call that evening, I was called. I talked to the nurse, and later I talked over the phone to the patient they had brought in; he told me he had been involved in an accident; he thought he had a head injury; he thought he should be seen by a physician, and thought he should be in the hospital that night. I came to the hospital and arrived very close to 2:00 a. m.

Q. Where did you first see him at the hospital — the person by the name of Chester Dombrowski? A. Emergency Treatment Room.

Q. What did you do after you observed him? What did you in the Emergency Room when you observed Chester J. Dombrowski? A. First of all, I tried to elicit the story of the accident again; but, at this particular time, the patient was completely uncommunicative. He said not one understandable word — seemed to be very, very sleepy from which we could not arouse him; he didn't seem to be

comatose. I did examine him very carefully at the time; and, then, since we had his identification, we made a long-distance phone call to his wife to try to find out more about the man's health or any condition that might account for this uncommunicative condition that the man demonstrated.

* * *

TESTIMONY OF BRUCE S. BOUDRY, from Exhibit C, Transcript of Proceedings of Trial in Fond du Lac County.

[91] BRUCE S. BOUDRY, called as a witness herein on behalf of the State, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION By Mr. Semenas

Q. Would you please state your name? A. Bruce S. Boudry.

Q. What is your address? A. Route #2, West Bend – Sandy Acre Road.

Q. What is your occupation? A. Deputy Sheriff, Washington County.

Q. Were you a Deputy Sheriff for Washington County on Monday, September 11th, 1967? A. Yes, sir, I was.

Q. Do you recall what hours you were on duty on Monday, September 11th, 1967? A. My hours at that time were from 7:00 p.m. at night until 3:00 in the morning of the next day.

[92] Q. That would be what date? A. From the 10th to the 11th — and 11th to the 12th.

Q. And who were you working with in the evening of September 11th, 1967, which is Monday? A. William Weiss.

Q. Did you have any occasion on the evening of September 11th to go to the vicinity of Kewaskum? A. Yes, sir.

* * *

Q. Who were you on duty with on September 11th, 1967? A. In the same squad with myself would be William Weiss.

Q. Did you investigate any accident on the evening of September 11th, 1967? A. Yes, sir.

Q. And where did you investigate this accident? A. In Washington County on Highway 45 approximately one mile north of Kewaskum at the county line.

Q. What did you observe when you went to this accident scene? A. When we got right to the car, is that what you want to know?

Q. Yes. A. We observed a late model Ford Thunderbird with a black top and maroon bottom.

[93] Q. Where was this car located? A. This car was in the ditch on the east side of Highway 45 and facing south.

Q. And what did you do after you arrived at the scene of this accident? A. I got the identification of the car, including the license number, and I took measurements from the car to a pole which was near by and to the bridge or to the road.

Q. What did you do just prior to arriving at the accident scene? A. Prior to the accident scene we went into Kewaskum to see if we could find the party who was involved in the accident.

Q. What did you do specifically? A. I went first from a tavern called Keller's; and, not finding the subject there, and being informed he was not there, I went across the street to the Glacier Inn.

Q. That is located where in Kewaskum? A. Right on the intersection of Highway 45 and 28, or Main Street in Kewaskum.

Q. What did you do after you went into the Glacier Inn? A. At first when I went in the door I observed four people at the bar — two people on the left at the end of the bar had drinks in front of them; one on the far right had a drink in front of him, and one man, near the center of the bar, and this man was along with the other four, and this man had no drink, and I asked all in the tavern at that time who had called the Sheriff's Department that was involved in an accident.

[94] Q. What did you do after you asked this question? A. Well, I didn't do anything until the man at the bar in the center stated that he was the one that called the Sheriff's Department that was involved in the accident.

Q. Now, do you see that man in the courtroom at the present time? A. Yes, sir.

Q. Would you point him out, please? A. Yes, sir, the man at the far right at the table over there.

MR. LEICHTFUSS: We will stipulate that the witness is referring to the defendant.

THE COURT: All right.

MR. SEMENAS:

Q. Did that person on the evening of September 11th, 1967, give you his name? A. Yes, sir.

Q. What did you do after this took place in the Glacier Inn with the person that you know as Chester J. Dombrowski? A. We asked him, or I asked him rather, to come with

myself out to the squad car, which was out in front, and go along with us to the accident scene so we could investigate the accident.

Q. Where was he seated in the car when you went out to the accident scene? A. He would be on the passenger side in the rear seat.

Q. Did you have any conversation with the defendant? A. Yes, sir.

[95] Q. Where? A. It started in the tavern when the man identified himself as Chester Dombrowski, and that he was a police officer in Cook County, Illinois, with the Chicago Police Department; and, at that time, he showed me a badge. Then we got to the car and we asked if there were any others involved—

MR. LEICHTFUSS: I object to the witness testifying as to "we" —

THE COURT: What you did, Mr. Boudry.

THE WITNESS:

A. It was my questioning, sir. I asked if there were any others involved in the accident, and he stated "no," that he was alone.

Q. Any other conversation on the way to the accident scene? A. (No answer).

Q. Do you recall any? A. I don't recall whether it was on the way to the scene of the accident or at the accident scene itself, but I asked what was the cause of the accident or how did it happen, and it was at the accident scene that the man gave us three different stories. One was that there was a jeep ahead of him that put on its brakes suddenly and

he swerved to avoid a collision, and that he went into the ditch. Another one was that there was a car approaching him in his lane and that he swerved to avoid a collision and went into the ditch. And the third story was that it was foggy that night, and he just missed the road and ran off of the road and into the ditch.

[96] Q. And how far was this accident, approximately, from the Village of Kewaskum? A. Approximately one mile.

Q. And what portion or what side of the road was this vehicle at the accident scene? A. Right at the accident scene there is a curve and a bridge, and the car struck the guard rail on the east or where it curves right. It could be classified as north east on the curve, and the car would have been going north and struck this guard rail, spinning around and ending up in the ditch on the east side of the road and on the south side of the river.

Q. What did you do after you made your observations and measurements at the scene of the accident? A. At the scene I wouldn't be sure who called, but the wrecker was called to remove the car; and, after the measurements were taken, and the wrecker was there, I searched the inside of the car just briefly because this man stated he was a police officer and had no gun on him, and I looked for this gun underneath the seat, in the glove compartment, in the back seat, and then locked the doors, and just prior to that, I put the car in neutral so the wrecker operator could pull it away, and then we took the driver to West Bend.

Q. Were you present at St. Joseph's Hospital in the early morning hours of September 12th, 1967? A. Yes, sir.

[97] Q. What time were you first present at St. Joseph's Hospital in West Bend in the early morning hours of September 12th, 1967? A. At exactly what time?

Q. Approximately what time? A. It was approximately 12:30.

Q. How long did you stay at St. Joseph's Hospital? A. I stayed there until — it would be 1:00 o'clock or shortly after 1:00 o'clock in the afternoon, and that would have been the 12th.

Q. Did you have any occasion to see Chester J. Dombrowski on September 12th while you were at St. Joseph's Hospital? A. Yes, sir.

Q. And where did you see him? A. I was with him constantly from when he was admitted to the hospital and taken to the emergency room, from the emergency room to the first floor to the room to which he was admitted, and I guarded him until I was relieved for breakfast or lunch, and then I would have gone for lunch for about an hour — and this time — I don't know if I could remember this time right now.

* * *

[99] Q. What were you doing outside the door? A. I was guarding the man who was in our custody.

* * *

TESTIMONY OF RAYMOND J. HOWARD, from Exhibit C, Transcript of Proceedings of Trial in Fond du Lac County Court.

[237] RAYMOND J. HOWARD, called as a witness herein on behalf of the State, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION By Mr. Semenas

Q. Would you please state your name? A. Raymond J. Howard.

Q. Where do you reside? A. 1410 E. Pioneer Road in the Town of Fond du Lac.

Q. What is your occupation? A. Undersheriff of Fond du Lac County.

Q. Were you the undersheriff for Fond du Lac County on September 12th, 1967? A. Yes, I was.

Q. Do you know of your own knowledge where the Dombrowski farm is located? A. Yes, I do.

Q. Did you have occasion to go to the Dombrowski farm on September 12th, 1967? A. Yes, I did.

[238] Q. Why did you go to the Dombrowski farm on September 12th, 1967?

MR. LEICHTFUSS: Immaterial as to "why"

THE COURT: I think that's true. Rephrase your question, please.

MR. SEMENAS:

Q. What did you do at the Dombrowski farm on September 12th, 1967? A. Met Washington County authorities and searched for a body.

Q. Did you make any other observations while you were at the farm on September 12th, 1967? A. Yes, I did. We examined the car.

Q. What car? A. 1960 Dodge owned by Chester Dombrowski.

MR. LEICHTFUSS: We object to that, your Honor.

THE COURT: The last portion of the answer may be stricken—the identification of the automobile being a 1960 Dodge may stand, and the jury is instructed to disregard at this stage the balance of the answer of this witness.

MR. SEMENAS:

Q. Where was this Dodge located on September 12th, 1967? A. The car? Q. Yes. A. Located on the northwest—off of the northwest section of the ramp leading into the barn.

Q. Do you know approximately how far that was from the barn? A. I would say from the barn it would be about 30 yards.

* * *

[462] RAYMOND J. HOWARD, called previously as a witness on behalf of the State, having previously been duly sworn, was examined and testified further as follows:

RE-DIRECT EXAMINATION By Mr. Semenas

Q. Please state your name and address? A. Raymond J. Howard, 1410 E. Pioneer Road.

Q. What is your occupation? A. Undersheriff of Fond du Lac County.

Q. Were you Undersheriff of Fond du Lac County on September 12th, 1967? A. Yes, I was.

Q. While you were on duty on September 12th, 1967, did you have any occasion to go to an area on County Trunk S & G, known as the Dombrowski farm? A. Yes.

MR. LEICHTFUSS: I object to the use of the word Dombrowski farm.

THE COURT: The answer was "Yes" and the answer may stand.

MR. SEMENAS:

Q. Mr. Howard, while you were at the Dombrowski farm on September 12th, 1967, did you make any observations of any vehicles? [463] A. Yes, there was a 1960 Dodge parked just north of the barn—northwest of the barn.

Q. Do you know what happened to that car on the evening of September 12th, 1967? A. Yes.

Q. To your knowledge? A. Yes, I had received a search warrant and an order to impound it, and I called the Olsen Service Station for a wrecker to come out and bring the car into the Safety Building.

Q. And was this car brought into the Safety Building? A. Yes, it was and impounded at the Safety Building.

Q. When did you see it next after seeing it on the Dombrowski farm on the evening of September 12th, 1967? A. I seen it in the early morning hours on the 13th, and around 8:00 a.m. on the 13th I took pictures. I took pictures in the garage in the Safety Building.

Q. Mr. Howard, do you know of your own knowledge under whose care, control and custody this car has been since September 12th, 1967? A. Under the Sheriff of Fond du Lac County.

Q. Do you know of your own knowledge where that car is at the present time? A. Yes.

Q. Where? A. Safety Building Garage — Sheriff's Department side.

[464] MR. SEMENAS: Your Honor, at this time the State would like to make a request.

THE COURT: Take the jury out, please.

Jury taken out of the courtroom at 11:20 a.m., and the following proceedings were had outside the presence and hearing of the jurors:

THE COURT: You may proceed.

MR. SEMENAS: Your Honor the request the State would like to make at this time is to go over to the Safety Building on the County side and have the Dodge and the car seats marked as exhibits for identification.

THE COURT: Have the Dodge and car seats marked? Are the car seats removable?

MR. SEMENAS: They could be brought up here, yes.

THE COURT: They will be brought into Court then, and the Court will direct this witness to remove the car seats and bring them into court. The balance of your request is to view the Dodge?

MR. SEMENAS: That is correct and have it marked as an exhibit for identification.

MR. LEICHTFUSS: May I be heard on that?

THE COURT: Surely.

MR. LEICHTFUSS: First of all, to my knowledge, there is no evidence in this record that in any way ties up that

Dodge [465] to the defendant, Mr. Dombrowski, and, therefore, in my judgment to permit a viewing of a Dodge or car seats or any identification of that car other than the fact that it is a car removed from the farm area is wholly immaterial and can prove to be very prejudicial as far as the defendant is concerned.

THE COURT: This vehicle was towed from somewhere on the highway, together with the defendant, at his request. I am trying to recall without checking my notes. It was towed by this garage man to this location on this farm, was it not?

MR. LEICHTFUSS: This vehicle, your Honor? Yes.

THE COURT: At the request of the defendant?

MR. LEICHTFUSS: Yes, that's true.

THE COURT: You feel that is not sufficient to tie this automobile in with the defendant — the defendant having some control over this vehicle to some limited degree at or about the approximate time that the offense is alleged here?

MR. LEICHTFUSS: Definitely, because there is no evidence to show that the defendant has any connection with that automobile other than the request that it be towed into the farm owned by his brother, Bernard Dombrowski.

THE COURT: The defendant was seen in this automobile sleeping at one time or seen sitting in the automobile by at least one other witness.

MR. LEICHTFUSS: I don't recall that testimony, judge.

[466] THE COURT: Who was that witness?

MR. SEMENAS: That was Beverly Richards. Your Honor, she was the waitress at the Fin-N-Feathers. She testified just after Mrs. Hatch.

THE COURT: That doesn't mean anything to me. Let's go off the record.

Brief discussion off the record at 10:25 a.m.

THE COURT: A vehicle was picked up. Do you feel that isn't sufficient identification?

MR. LEICHTFUSS: I don't think sufficient identification or connection between the defendant and that vehicle to permit evidence from that vehicle.

THE COURT: He was in it and exercised control over it at the time that the garage man was there, and he designated the place to where it was to be hauled to.

MR. LEICHTFUSS: She saw the defendant in a old greenish car as my notes show; nothing in my notes that say that this is the car for instance that was towed off. I don't know. Furthermore there is no showing that this defendant did anything other than have that car towed in according to the record. I have a couple of other questions I would like to ask this witness.

MR. SEMENAS: Well, the call for the wrecker was made from Lake Seven by this one witness that testified, and the garage operator testified that this person went back with him [467] to the same area that the waitress, Mrs. Richards, testified that she observed the defendant in this automobile. This same person testified that the defendant said his car was disabled or stuck, and as he went to church with his wife and grandchildren he noticed this car was there, same spot that the Richards woman said, same area between the Fin-N-Feathers and Lake Seven. And this same car was taken subsequently — the same car was taken, and no other vehicles were observed by anyone.

MR. LEICHTFUSS: That we don't know.

MR. SEMENAS: From the testimony we have in the record, no one observed any other vehicles. And also the Norskog boy testified that this same vehicle that he saw was towed in next to the barn — same vehicle that he had seen towed in.

THE COURT: The Court is of the opinion that the vehicle is sufficiently identified as having been under the control of the defendant, Chester Dombrowski, at a time interval sufficiently close to the alleged offense; that the vehicle or items from it may be material in this proceedings. Now you may be permitted to bring the car seats into Court, and we will have them marked as exhibits. The balance of your request is what, Mr. Semenas?

MR. SEMENAS: Well, I figure it would be rather difficult to bring the car in.

[468] THE COURT: I would think so.

MR. SEMENAS: We could go down and have it marked for identification as an exhibit down there. As the testimony shows, it is on the County side of the Safety Building near the ambulance.

THE COURT: Any reason why a colored photograph of the vehicle could not serve the same purpose?

MR. SEMENAS: Well, I just thought it would be the best evidence; we do have it there.

THE COURT: You ask purely for an external view of that vehicle; is that correct?

MR. SEMENAS: That's all. External view, yes.

THE COURT: What is your position on that, Mr. Leichtfuss?

MR. LEICHTFUSS: Well, judge, in my judgment, we are getting into a very dangerous area. This particular vehicle, as far as for purposes of indicating that the defendant on the 10th of September had control of that vehicle and carrying that over as being material to the crime alleged in the indictment is a gap — There is a gap in there that I think is being dangerously bridged on the basis of insufficient identification of the ownership of that car. Secondly, as far as I am concerned—

THE COURT: This may very well be true. The Court does [469] not contemplate trying to close all gaps by one particular incident or permitting one exhibit to be received into evidence. It appears to the Court that the State's course of presenting this matter has been, to some extent thus far, circumstantial — and the incidents that at least allegedly to have occurred prior to the crime that is charged. It appears to this Court that it should be received by the Court where there is an association directly or indirectly to the defendant, and that's my view of the automobile right now.

MR. LEICHTFUSS: I don't mean to argue with the Court, but I am—

THE COURT: Go ahead.

MR. LEICHTFUSS: I am having this problem. You see the Dodge we refer to or referred to in some testimony as being an old greenish car—And the little Norskog boy says it is a Buick or a Dodge. All through that identification there is no establishment of any connection between Dombrowski and that car other than the fact that it was he who

supposedly brought the tow truck operator in that hauled the car to the farm — Nothing to say in this record that that car was his.

THE COURT: Doesn't have to be, does it?

MR. LEICHTFUSS: We are only trying Chester Dombrowski here.

THE COURT: It could be a borrowed car or a stolen car that he had contact with.

[470] MR. LEICHTFUSS: The only contact is established on the 10th of September, 1967, which, in my judgment, precedes any allegation that we are in court to defend against here. There is no tie up with that car, this defendant, and what we are in court for. Now I have one other point I would like to make on it, judge. The search warrant indicates that Mr. Howard at 8:15 on the 12th of September got a search warrant. The Court was taking judicial notice of this search warrant, and I would like to point out the fact there is no order in this search warrant to impound the car; secondly, we have testimony that puts Mr. Howard at the scene of this car at 8:15.

THE COURT: Right, that's Mr. Whealon's testimony. The court record, however, shows the proceedings taking place on September 12th, 1967, at 8:02 p.m., right? And the search warrant was dated and the time was 8:15 p.m. on the 12th, right?

MR. LEICHTFUSS: 8:15, September 12th, is what I have.

THE COURT: On the original document— This Court at this time is taking judicial notice of that particular search warrant as long as the matter has been raised before the Court.

MR. LEICHTFUSS: The order, according to Mr. Whealon's testimony, to go and pick up a car was made at 7:30 p.m.

THE COURT: That is right.

[471] THE COURT: I believe his testimony was that he actually picked it up at 9 and hauled it back and delivered it at 10:00.

MR. LEICHTFUSS: Received a call at 7:30 and arrived at 8:15 p.m., and said later "give or take 15 minutes" — What I am suggesting, of course, is not only were the actions of the wrecker such that they were being made pursuant to directions issued prior to the issuance of any search warrant which would contaminate the impounding of the car, but further, Mr. Howard's own testimony is not consistent with this document; there is no order in there to impound that vehicle.

THE COURT: Going to Page 4 of the transcript, the magistrate who was Judge McEssy in that proceedings, Hazen McEssy, stated on Page 4: "This Court hereby authorizes the issuance of a search warrant to Undersheriff Raymond Howard to search both vehicles and impound the same and make a report to this court as to his findings within the next 48 hours." Now, obviously, that comment by the magistrate at that time had reference to the Dodge as one of the vehicles located on the Dombrowski farm. Then, on the 14th day of September, Mr. Howard appeared before Judge Hazen McEssy and advised the court that they had searched the vehicle pursuant — On page 1 of the transcript — pursuant to the warrant and had impounded the vehicle in the Safety Building Garage in Fond du Lac. Now, this court is of the opinion that items within a vehicle of this nature and specificially under the circumstances, the interior of the vehicle could very

[472] well be evidence which they were authorized to search the interior of this vehicle for; items attached to the vehicle may very well be such it wouldn't compel the searching authority to segregate those items from the vehicle itself. What I am referring to is upholstery and things of that nature. So it appears to this Court that under the circumstances, the search warrant directed to the 1960 Dodge, which is sufficiently identified, and the act of impounding the Dodge in the Safety Building pursuant to said search warrant, more specifically after the searching authority reported to the court, that they had so done, and it was subject to review by the court at the time of the searching authority making such report, that the vehicle is properly within the authority of the search warrant and properly within the custody of the Sheriff's Department.

MR. LEICHTFUSS: May I say one word?

THE COURT: Yes.

MR. LEICHTFUSS: It appears patently obvious what was done here was that a search was conducted and an order was issued by the Sheriff's Department to impound the car, with that completed, they then go to the magistrate to get a search warrant.

THE COURT: You have the testimony of Mr. Whealon, and you are entitled to use the transcript here to impeach his testimony if you so desire. This Court has before it the [473] court record, which I have no reason to believe is other than as stated therein; and, so far as this Court is concerned from the preliminary testimony on motions and the testimony throughout this trial, this Court has no reason to disbelieve the court record, which it has now taken judicial notice of in this proceedings. The 1960 Dodge that is in the

custody of the Sheriff's Department may be marked as an exhibit. Now, the question is what do you want done with it — marked as an exhibit for identification?

MR. LEICHTFUSS: We object to any viewing unless it is in evidence.

THE COURT: It will have to be done. I would suggest that we take any proceedings had in connection with that automobile be in the absence of the jury from the standpoint of identification of it; and, then, subject to the Court's ruling in that respect, it would be determined whether or not they would be permitted to view it. If it is received, they, of course, would be permitted to view it.

MR. SEMENAS: That is satisfactory with the State.

THE COURT: We will do that at 1:30; rather than convene here in court, counsel and the defendant, clerk and the reporter, and the witness will convene in the garage of the Safety Building. We will proceed with the testimony for purposes of identification at that time. The automobile seats you can have brought here to court. The witness is so instructed [474] at the time we view this automobile for purposes of identification he will remove them in the Court's presence — the seats that may be brought to court for subsequent identification.

MR. SEMENAS: That is satisfactory with the State.

THE COURT: All right. Would you ask the bailiff to come in, please. We will recess at this time for the noon luncheon. We will stand recessed until 1:30 at which time we will convene at the Safety Building.

(Recess for lunch, 11:45 a.m.)

The following proceedings took place in the Safety Building Garage, 1:30 p.m., July 15th, 1968, outside the presence of the jurors:

Appearances: Court, Clerk, Reporter, all attorneys and the defendant, Sheriff & Undersheriff.

THE COURT: Mr. Howard was the last witness on the stand, and he is present here. The State has made a request relative to the blue Dodge that is in the custody, according to the testimony, of the Sheriff of Fond du Lac County. The request is to have the same marked as an exhibit; is that correct?

MR. SEMENAS: That is correct, your Honor. An exhibit for identification.

[475] THE COURT: May I ask this question, which I think we discussed this morning. Does the State have a colored photograph of this vehicle that would be adequate – at least one or more?

MR. SEMENAS: We would like to have the car marked. That is our opinion right now.

THE COURT: All right.

Whereupon the 1960 Dodge was marked for identification as State's Exhibit No. 40.

THE COURT: Do you have some questions you wish to ask of Mr. Howard?

MR. LEICHTFUSS: I have a couple, your Honor.

THE COURT: We will let the State proceed first.

RE-DIRECT EXAMINATION By Mr. Semenas

Q. Mr. Howard, what has been marked as State's Exhibit No. 40 for identification, did you have occasion to see this vehicle on September 12th, 1967? A. Yes, I did.

Q. And where did you first observe this vehicle? A. On the Chester and Bernard J. Dombrowski farm.

MR. LEICHTFUSS: I object. There is a stipulation that at the time it was owned by Bernard Dombrowski.

[476] THE COURT: Objection sustained.

MR. SEMENAS:

Q. Where did you first observe this vehicle on that farm? A. This vehicle was a little northwest of the barn sitting in a field.

Q. And where on the farm was this vehicle when you first—Mr. Howard, where was State's Exhibit No. 40 for identification when you first observed it on the farm in the Town of Auburn, Fond du Lac County, Wisconsin, on September 12th, 1967? A. Sitting in a field just northwest of the barn.

Q. In what direction was that vehicle facing? A. North.

Q. Would you look over State's Exhibit No. 40 for identification?

(Witness looks over the automobile and opens the hood of same)

Q. Mr. Howard, after looking over State's Exhibit No. 40 for identification, do you state this is the same vehicle you observed on the Dombrowski farm — on this farm — in the Town of Auburn, Fond du Lac County, Wisconsin, on September 12th, 1967? A. Yes.

Q. How do you know it is the same vehicle? A. One thing, the hole in the radiator — blood on the back seat –

MR. LEICHTFUSS: I object to that.

THE WITNESS: What appears to be blood.

THE COURT: The answer may stand.

[477] MR. SEMENAS:

Q. Do you know of your own knowledge what happened to this vehicle? A. Yes, this vehicle was brought up to the Safety Building — County side of the Sheriff's Department Garage.

Q. Do you know who transported that vehicle? A. Yes, Patrick Whealon.

Q. Do you know in whose custody this vehicle has been since September 12th, 1967, up to the present time? A. Yes, the Sheriff of Fond du Lac County.

Q. Do you know of your own knowledge where the keys to this vehicle have been kept during this period of time? A. Yes.

Q. Where were they kept? A. By the Sheriff.

Q. And who do you mean by that? A. Harry Rozek.

MR. SEMENAS: That's all the questions I have, your Honor.

RE-CROSS EXAMINATION By Mr. Leichtfuss

Q. Mr. Howard, is the automobile in the same condition today as it was when you first observed it? A. No.

[478] Q. Would you tell us what is different about it? A. It is more rusted, and there is some paint off. I don't

know if that was there, but there was one dent in the car, but I don't know which one it was.

Q. Is the inside the way it was when you saw it first? A. The seats are all loosened.

Q. Any other differences? A. Floor mats removed; otherwise about the same.

Q. What time of the day on September 12th, 1967, did you first see this car? A. I would state it was about 3:45 or 4:00 o'clock.

Q. What time did you call Olsen's Wrecker Service? A. I don't recall.

Q. Has this car been here ever since it was towed in? A. No, it hasn't.

Q. Where was it kept when it was first brought in? A. Kept here first.

Q. Then where? A. Moved out to the County Garage and held at the County Garage.

Q. When was it brought in here? A. When was it brought back here? Q. Yes, sir. A. I believe last Friday.

Q. After the 12th of September, 1967, when did you next see the car? A. I seen it in the early morning of the 13th somewheres after 1:00 a.m., then the following morning again around 8:00 a.m.

[479] Q. When did you next see it after that? A. I don't recall; I saw it numerous times after that but —

Q. Did you check the car periodically when it was out at the County Garage? A. No, I didn't.

Q. Any doubt in your mind as to the color of this vehicle? A. No.

Q. Was the tire flat when you first saw it? A. No,

MR. LEICHTFUSS: That's all.

RE-DIRECT EXAMINATION By Mr. Semenas

Q. Mr. Howard, do you know of your own knowledge who took State's Exhibit 40 for identification out to the County Garage? A. Yes, Norman Olsen, Jr.

Q. Do you know who might have brought it back here? A. Last Friday?

Q. Yes. A. Patrick Whealon.

MR. SEMENAS: I have nothing further.

THE COURT: Are you going to have the seats extracted and marked as exhibits to be brought into court?

MR. SEMENAS: Yes.

[480] MR. LEICHTFUSS: May I ask a few more questions about this car with reference to Mr. Semenas' re-direct?

THE COURT: Right.

RE-CROSS-EXAMINATION By Mr. Leichtfuss

Q. You were present, Mr. Howard, when the car was removed by Mr. Olsen? A. No.

Q. You don't know of your own knowledge? Somebody told you; is that it? A. Well, I don't remember if I made the call or not to have him take it out there, but he said he would —

Q. You were not present when it was removed? A. No.

Q. Were you present when it was returned? A. No.

Q. So you don't know that of your own knowledge, do you? A. No.

MR. LEICHTFUSS: That's all.

THE COURT: Sheriff, is the vehicle locked now?

MR. ROZEK: Yes, it is, your Honor.

THE COURT: Would you unlock it, please, and permit the State to extract the items they wish to have separately marked and brought into court.

[481] Whereupon, the following exhibits were marked for identification:

State's Exhibit No. 41 — back seat of Dodge
State's Exhibit No. 42 — front seat " "
State's Exhibit No. 43 — back rest of back seat of Dodge

THE COURT: You may have the record show that in the Court's presence and the defendant's presence that at the Court's suggestion Mr. Howard removed what have been marked as State's Exhibits 41, 42 & 43, and the Court will charge Mr. Howard with the custody of those exhibits until such time as they are presented in court for further identification. There is no need to go any further in that respect.

MR. LEICHTFUSS: I think the record should show that the defense agrees with the description of the removal of those three exhibits.

THE COURT: All right. The vehicle has been relocked; is that correct, Mr. Rozek?

MR. ROZEK: Yes, your Honor.

THE COURT: Okay, we will go back to the courtroom then.

Proceedings resumed in the courtroom at 2:00 p.m. — all counsel present, defendant present, jury in the box.

* * *

[489] RAYMOND J. HOWARD, resumed the stand, having been previously duly sworn, was examined and testified further as follows:

RE-DIRECT EXAMINATION By Mr. Semenas

Q. Mr. Howard, you have been sworn before; is that correct? A. Yes.

Q. Would you state your full name?

MR. LEICHTFUSS: We will stipulate as to his name and occupation.

THE COURT: Same Mr. Howard that previously testified and I am sure the jury is aware of that, and the record may [490] so show.

MR. SEMENAS:

Q. Mr. Howard, there have been Exhibits Nos. 41 for identification, 42 for identification, and 43 for identification marked; would you come over and see if you can identify State's Exhibit 41 for identification?

(Witness leaves the stand and goes over to the exhibits).

A. Yes, this is the back seat from the 1960 Dodge.

Q. And would you identify State's Exhibit 42 for identification? A. This is the front seat and back — Exhibits 42 and 43.

Q. Front seat and back rest of the seat from what? A. 1960 Dodge.

Q. And would you explain State's Exhibit 43 for identification? Would you identify it? A. This is the back of the back seat of the 1960 Dodge — back rest.

(Witness resumes the stand).

Q. You brought them into court; is that correct? A. Yes.

Q. When did these items come into your possession?

MR. LEICHTFUSS: I think we have stipulated, your Honor, and we have no objection to the jury hearing that stipulation today.

THE COURT: During the period from 1:30 to 2:00 o'clock, the Court took testimony from Mr. Howard at the Safety Building Garage, at which time Exhibit 40 was observed, and then 41, [491] 42 and 43 were observed and marked in the presence of the parties — the defendant and counsel and the Court; and, since that time, they have been in Mr. Howard's custody and produced here in Court since we closed the testimony at the Safety Building Garage.

MR. SEMENAS:

Q. Mr. Howard, when was the first time that you saw State's Exhibit 41 for identification, State's Exhibit 42 for identification, and State's Exhibit 43 for identification? A. September 12th.

Q. September of what year? A. 1967.

Q. And where was this at that you made your first observation of these three exhibits for identification? A. On the Bernard Dombrowski farm.

Q. What was their location, these three exhibits, when you first observed them? A. They were intact in the automobile.

Q. What automobile? A. 1960 Dodge.

Q. What color? A. Blue.

Q. What happened after you first observed Exhibits 41 for identification, 42 for identification, and 43 for identification, if you know of your own knowledge?

[492] MR. LEICHTFUSS: I object to the form of the question unless I misunderstood. Do you mean what happened to these exhibits?

THE COURT: I don't know; rephrase your question, please.

MR. SEMENAS:

Q. Mr. Howard, do you know of your own knowledge when State's Exhibit 41 for identification, 42 for identification, and 43 for identification were taken out of the Dodge?

THE COURT: We just stipulated they were taken out between 1:30 and 2:00 o'clock July 15th, 1968, in the presence of the Court.

MR. SEMENAS:

Q. Mr. Howard, was there any previous time that you know of your own knowledge that Exhibit 41 for identification, 42 for identification, and 43 for identification were taken out of a 1960 Dodge that you observed on the Dombrowski farm? A. Yes.

Q. When was that? A. September 13th. Q. What year? A. 1967.

Q. Where? A. Safety Building Garage.

Q. Who removed these seats, do you know? A. I can't think of his name right now; he was from Henco Motors

[493] Q. Who was present at that time? A. Mr. Mauer from the Crime Lab.

* * *

Q. Mr. Howard, were Exhibits 41, 42 and 43 returned to you? A. Yes.

Q. When were they returned to you? A. December 19th, 1967, at the State Crime Laboratory in Madison.

Q. After the return of 41, 42 and 43 to you, Mr. Howard, what did you do with these items? A. Brought them back to Fond du Lac and put them back in the Dodge — 1960 Dodge.

[494] MR. SEMENAS: That's all the questions I have of this witness at this time. I would like to re-call him later.

THE COURT: Any cross-examination?

RE-CROSS-EXAMINATION By Mr. Leichtfuss

Q. Mr. Howard, where was this Dodge when you put the seats back in? A. In Mr. Olsen's lot where he keeps automobiles that he brings in from wrecks and so forth.

MR. LEICHTFUSS: That's all.

THE COURT: You may step down. You are admonished, relative to your testimony, not to discuss it with other prospective witnesses.

* * *

[590] RAYMOND J. HOWARD, resumed the stand, having been previously duly sworn, was examined and testified further as follows:

RE-DIRECT EXAMINATION By Mr. Semenas

Q. Would you please state your name? A. Raymond J. Howard.

MR. SEMENAS: Your Honor, at this time I would like to have him step down from the stand and look at State's Exhibits 41, 42, and 43 for identification.

Q. By "lot" what do you mean? A. The car was locked after the seats were put in, and the key was returned to the Sheriff.

MR. LEICHTFUSS: That's not responsive.

THE COURT: Not responsive, and the jury is instructed to disregard it. Rephrase your question, please.

MR. SEMENAS:

Q. Do you know where State's Exhibit 41 marked for identification was kept from December 19th, 1967?

[594] MR. LEICHTFUSS: We object to that question, your Honor; it is the same question asked earlier.

THE WITNESS: Yes.

THE COURT: He answered "Yes." The answer may stand.

MR. LEICHTFUSS: I notice the bailiff is pointing to somebody at your table for a telephone call.

THE COURT: We are running a court here; we are not running a telephone answering service. Explain and tell the party to call back some other time.

MR. SEMENAS:

Q. Where was it kept?

THE WITNESS:

A. In the 1960 Dodge.

MR. LEICHTFUSS: I object again unless that foundation is laid, and this is also repetitious.

THE COURT: Just wait a minute, please. Mr. Cler, will you tell the operator downstairs we don't want any

telephone calls coming into this court either through the reporter's phone or to anybody else; I don't want any of these phones ringing. Read the question and answer back please.

Whereupon the following question and answer was read back:

QUESTION: Where was it kept?

ANSWER: In the 1960 Dodge.

THE COURT: The answer will stand.

MR. SEMENAS:

[595] Q. Mr. Howard, did you have any occasion to observe State's Exhibit No. 41 for identification after December 19th, 1967? A. Yes.

Q. After you obtained possession of State's Exhibit No. 41 marked for identification on the 19th of December, 1967, where did you place this item?

MR. LEICHTFUSS: Repetitious.

THE COURT: Sustained.

MR. SEMENAS:

Q. Mr. Howard, you have also looked at State's Exhibit 42 for identification; is that correct? A. Yes,

Q. And can you identify it? A. Yes, 42 is the front seat.

Q. And was State's Exhibit 42 for identification ever in your possession? A. Yes.

Q. And when did it come into your possession? A. When I first searched the car with the search warrant and impounded it.

Q. And did it ever come into your possession at a later date? A. Yes, when I picked it up at the State Crime Laboratory in Madison.

Q. And when was that date? A. December 19th, 1967.

[596] Q. After you obtained possession have State's Exhibit marked No. 42 for identification, what did you do with it? A. Returned it to Fond du Lac and put it in the 1960 Dodge.

Q. Now, Mr. Howard, you have also looked at State's Exhibit No. 43 for identification; is that correct? A. Yes, I have.

Q. Can you identify it? A. Yes, that's the backrest of the back seat.

Q. Of what? A. 1960 Dodge.

Q. Which Dodge are you speaking of? A. Dodge I found on the Dombrowski farm.

Q. And did this ever come into your possession? A. Yes.

Q. When? A. When I searched the car and impounded it.

Q. That was when? A. September 12th, 1967.

Q. Did State's Exhibit 43 for identification also come into your possession at a later date? A. Yes, it did.

Q. When was that? A. December 19th, 1967, at Madison at the State Crime Laboratory.

Q. And after you re-obtained possession of State's Exhibit No. 43 for identification on December 19th, 1967, what did you do with it? [597] A. Returned it to Fond du Lac and put it in the 1960 Dodge. The 1960 Dodge recovered at the Dombrowski farm.

Q. And where was this car located on December 19th, 1967? A. At a car lot on East Scott Street in Fond du Lac.

Q. What type of lot do you mean? A. This is a lot where Mr. Olsen keeps cars that are in accidents and so forth, and they must be kept until the insurance and so forth is looked at. He has a gate there at his lot—

MR. LEICHTFUSS: I think the answer is going far beyond what is necessary to answer the question, and I object.

THE COURT: Overruled; it is a general description. Had you completed your answer?

THE WITNESS: Yes.

THE COURT: The answer may stand.

MR. SEMENAS: Your Honor, at this time I would like to move for the admission into evidence of State's Exhibits 41, 42, and 43 that have been marked for identification.

MR. LEICHTFUSS: Of course, we object, your Honor; there has been no showing of care, custody and control maintained over these exhibits from December 19th until we saw them yesterday, and they were not under the care, control and custody of the Sheriff out at some car lot; there has been no showing of any kind as to their condition then, their condition now—whether they fairly represent or depict what they claimed to depict on December 19th. All kinds of foundation questions have not been answered.

[598] THE COURT: Objection overruled. 41, 42 and 43 will be received. It appears to the court that all persons that had contact with these exhibits have been identified, and the chain is not broken as to the custody of 41, 42, and 43.

MR. SEMENAS: Your Honor, I have no questions of Mr. Howard at this time; I would like to recall Mr. Linssen.

THE COURT: Cross-examination?

RE-CROSS-EXAMINATION By Mr. Leichtfuss

* * *

Q. And the keys for the car were kept where? A. With the Sheriff.

Q. They were? A. As far as I know.

Q. You don't know, do you? A. No.

Q. So your answer to my question is "I don't know"? A. The last I know the Sheriff had the keys.

Q. Do you know where they were kept? [599] A. No.

* * *

[668] RAYMOND J. HOWARD, resumed the stand, having been previously duly sworn, was examined and testified further as follows:

DIRECT EXAMINATION By Mr. Leichtfuss

Q. Your name is Raymond Howard? A. Yes.

Q. You are the Undersheriff for Fond du Lac County? A. Yes.

Q. Would you tell us what that title means? A. I am right underneath the Sheriff.

Q. That's what it means? A. Second in command.

Q. Not all deputy sheriffs are called undersheriffs? A. No.

Q. How long have you been a member of the Sheriff's Department in one capacity or the other, Mr. Howard? A. Just about 15 years.

Q. And during that period of time have you also been Sheriff of Fond du Lac County? A. Yes.

[669] Q. Can you tell us when that was, please? A. For four years prior to a year and a half ago.

Q. You were the Sheriff prior to Sheriff Rozek? A. That is right.

Q. And prior to that 15 years were you also involved in law enforcement work? A. Undersheriff four years prior to being Sheriff, and I was a county traffic officer before that.

Q. You had a period of 15 years that you have been involved in law enforcement work? A. Yes.

Q. Prior to that time were you also involved in law enforcement? A. No.

Q. During the course of your employment, Mr. Howard, that you have been involved in law enforcement work have you had numerous occasions to investigate suspected criminal activity? A. Yes.

Q. Could you give us an estimate of about how many? A. No.

Q. You have no idea? A. That is right.

Q. Now, with reference to the events of September of 1967, starting with the recovery of a body on the Bernard Dombrowski farm, did you participate in any of the investigation of that discovery? A. Yes.

[670] Q Were you, in fact, the chief investigator and the head of the investigation surrounding that recovery? A. I just participated in my capacity.

Q. As Undersheriff of Fond du Lac County? A. Yes.

Q. Do you mean by that you were at all times directed and controlled by the orders of the Sheriff of Fond du Lac County? A. Yes.

Q. So he would more properly be described as the chief investigator of that investigation; is that right? A. Yes.

Q. Did you have occasion to visit the Bernard Dombrowski farm on the afternoon of September 12th, 1967? A. Yes, I did.

Q. And when you arrived at the farm, state whether or not you went to an area that has been variously described as a dump and/or picnic area? A. Yes.

Q. And while you were there, did you observe a body? A. Yes.

Q. Did you make other observations of the area surrounding where the body was? A. Yes.

Q. Would you tell us what observations you made? [671] A. We searched the area for different material.

Q. That's what you did; I asked what you observed? A. We observed where the campsite was — found the sock there; just made a general observation of the area.

Q. Can you state whether or not on the basis of your observations you saw any blood in the area where the body was? A. No.

Q. Based on that observation did you form any conclusion? A. No.

Q. Did you express any conclusion as to what the absence of blood at the scene meant to you? A. No.

Q. Do you have any opinion as to what that means? A. No.

Q. That meant nothing to you then I assume? A. No.

Q. You mean "No, it didn't"? A. No, it didn't.

Q. At that time it didn't. At some subsequent time did it? A. Later on.

Q. When? A. After we noticed the Dodge.

Q. When did you notice the Dodge? A. After we investigated the area there and went over by the farmhouse.

[672] Q. When you went over toward where the farmhouse is did you observe a Dodge? A. Yes.

Q. Did you look at the Dodge? A. Yes.

Q. Did you look into the Dodge? A. Through the windows, yes.

Q. Tell us what you observed in the Dodge? A. We observed—I observed the pillow case covering what appeared to be blood. You could see blood where it ran down off of the cushion and was beyond the coverage range of the pillow case. You could see blood on the briefcase on the floor; you could see blood splattered on the back of the front seat and on the side of the back seat of the car.

Q. Would you step down here a minute, Sheriff Howard? Could I call you Sheriff?

THE COURT: Call him Mr. Howard, please.

MR. LEICHTFUSS:

Q. These are State's Exhibits 41, 42, and 43. Would you show us what it is you observed on those exhibits that you have just testified to? A. This is Exhibit No. 41. This is the rear seat of the Dodge, and a pillow case was laid across this here area, and you could see this other area which has still got a substance of the blood on.

[673] Q. Well, when you say a pillow case covering that area, could you see the area you can see now? A. All except where the pillow case was.

Q. Bring that over here a minute, would you? Show us where the pillow case was? A. The pillow case laid in here like this — This area, this area where you could still see –

Q. You could see that area? A. Yes.

Q. And you do see down here, right? A. I could see here on down.

Q. From about here on down?

MR. LEICHTFUSS: Let the record reflect we have referred to half of the car seat with a diagonal crossing of some covering being over it, and the witness has described that he could see the half that was uncovered and a portion of the half that was covered.

Q. Now, Mr. Howard, can you show me on what is marked State's Exhibit 42 what it is that you observed in respect to there being blood? A. In the area right here, and here— The back seat.

THE COURT: Would you state for the record what area he designated?

MR. LEICHTFUSS: Designated by the witness, I believe, is fairly described as the back area of what is marked as Exhibit 42 for the State.

[674] Q. Referring to State's Exhibit 43, Mr. Howard, did you make any observations with reference to that? A. I did, but I didn't notice anything at the time on that.

Q. Can you state whether or not you had any way of telling the amount of blood that you observed or suspected of being blood that you observed? A. The amount?

Q. Yes. A. No.

Q. Can you state whether or not you had any way of telling how long the stains you observed had been present? A. No, not at that time.

Q. Now, in your investigation, Mr. Howard, can you state whether or not anybody had seen Mr. McKinney alive in the State of Wisconsin? A. No.

Q. You mean no, you can't? A. No, I can't.

Q. Did you investigate that aspect? A. Yes.

Q. And did your investigation turn up anything? A. No.

Q. Can you state whether or not your investigation showed where Mr. McKinney was when the bullet that was recovered from his head entered his head? [675] A. No.

Q. Did you investigate that aspect of it? A. No.

Q. Can you state whether or not your investigation showed where Mr. McKinney was when he died? A. No.

Q. Did you investigate that aspect of it? A. As much as we could.

Q. Can you state whether or not in your investigation you were able to describe the condition of State's Exhibits 41, 42 and 43 prior to September 12th, 1967? A. I didn't get that.

Whereupon the above question was read back.

THE WITNESS: No, I had no occasion to see the car before then.

MR. LEICHTFUSS:

Q. Did you investigate that aspect of it? A. Yes.

Q. And your investigation didn't turn up anything? A. Yes, it turned up things.

Q. You talked to people who had observed the car in its condition prior to September 12th, 1967? A. Yes.

Q. And were they able to describe for you the condition of State's Exhibits 41, 42, and 43? A. They advised us of certain things about it, yes.

[676] Q. And what day had they seen the car on? A. The morning of the 10th.

Q. And had they told you anything about the condition of the seats marked for identification as 41, 42, and 43 for the State? A. Yes, they didn't observe anything on the back seat.

Q. So, did you talk to anybody else about any observations as to the condition of State's Exhibits 41, 42 and 43? A. Yes, I believe we talked to the sergeant from the West Bend Police Department — when he was stopped down there, and he observed nothing in the back seat on Saturday night, September 9th.

Q. Who did you talk to besides that? A. Mr. Staege.

Q. Same Mr. Staege that testified here? A. Yes.

Q. When had he seen the car? A. When he pulled it in on Sunday, September 10th, when he took it to the farm.

Q. Can you state whether or not in your investigation you had occasion to talk to other neighbors in the area of the Bernard Dombrowski farm? A. I don't know.

Q. Well, did your investigation include that? A. Some of our men talked to the neighbors, yes.

Q. Can you state whether or not you asked anybody whether or not they had heard a noise on the morning of September 11th, 1967? [677] A. No, I didn't.

Q. Did any of your officers at your direction or the sheriff's officers do that? A. To my knowledge I don't know.

Q. Well, were you familiar with all of the details of the investigation that was being conducted, Mr. Howard? A. Most of them, yes.

Q. Did you learn of anybody that had heard a shot in the morning of September 11th, 1967? A. No.

MR. LEICHTFUSS: That's all, Mr. Howard; thank you.

CROSS-EXAMINATION By Mr. Semenas

Q. Mr. Howard, Mr. Leichtfuss asked if you came to any conclusions after you observed the body; I will ask you if you came to any conclusions after observing the body and observing the Dodge? A. Yes, with the blood there in the Dodge.

Q. What conclusions did you come to? A. That there wasn't any blood out by the scene because it was all in the Dodge.

Q. You stated there was an amount of blood, what do you mean? A. After I viewed the raincoat that was loaded with blood and the floor mat and the amount of blood after we pulled the car seat out that had run down into the framework of the car and so forth.

* * *

[678] Q. Based upon your observations of the body and the Dodge, what conclusions did you come to regarding this incident? A. That he was shot in the Dodge.

MR. SEMENAS: That's all the questions I have.

RE-DIRECT EXAMINATION By Mr. Leichtfuss

Q. Mr. Howard, when did you come to a conclusion as to when he was shot in the Dodge? A. No, I didn't come to a conclusion when he was shot in the Dodge.

[679] Q. You said you formed an opinion based on your observations that the man you saw in the dump area had been in the Dodge; is that correct? A. Yes.

Q. Were you able to determine the amount of blood that you observed or thought you observed in the Dodge? A. Between the Dodge and what I seen on the raincoat and the floor mats.

Q. Were those in the Dodge? A. No, not at the time – At the West Bend Sheriff's Department.

Q. On the basis of your observations of the Dodge, were you able to draw the conclusion that there was a lot of blood in the Dodge? A. Yes.

Q. And is part of your opinion based on the raincoat and floor mat that you refer to? A. Also that, yes.

Q. You didn't see those at the Dodge, did you? A. No.

Q. Can you tell us what you mean by a lot of blood? A. A lot of blood covering the raincoat; it was just about completedly soaked, and the same way with the floor mats. The towel was still wet, and the pail at the West Bend Police Department —

Q. When did you observe those items at the West Bend Police Department? A. On the night of the 12th.

[680] Q. Do you remember what time? A. Yes, it was before 10 o'clock. I also know when I opened the door of the Dodge there was still wet on the back seat.

Q. Did you observe any blood on the ground around the Dodge? A. No. There was on a black tie laying by the Dodge and some on a match case.

Q. Where is that black tie today, do you know? A. No, I don't know.

Q. Know where the match case is? A. A book of matches laying by the front door that had blood on.

Q. Do you know where that is today? A. I believe all at the Crime Lab or — They had them.

Q. They did have them though? A. Yes.

MR. LEICHTFUSS: That's all.

* * *

TESTIMONY OF KENNETH E. SUNDBERG, from Exhibit C, Transcript of Proceedings of Trial in Fond du Lac County Court.

[357] KENNETH E. SUNDBERG, called as a witness on behalf of the State, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION By Mr. Semenas

* * *

[359] Q. Were you in the Fond du Lac area on Tuesday, September 12th, 1967? A. Yes, I was.

Q. Do you recall what time of the day on Tuesday, September 12th, 1967 you were in the Fond du Lac area? A. As I recall I was up here on a field unit run from the laboratory in the evening, I believe — I left approximately 4:30 from the laboratory and arrived up here around 7:00 o'clock.

Q. Do you know where you went?

* * *

THE WITNESS: Went out to a farm, which I was not familiar with, and we were escorted out to the scene or to the locale.

MR. SEMENAS:

Q. What do you mean by "we"? A. The others — Cleon Mauer who was the Lab representative, and I was accompanying him for the purpose of taking photographs.

[360] Q. And do you recall approximately what time you arrived at the farm on September 12th, 1967? A. As I recall, it was about 7:20 or 7:25, something like that, in the evening. It was getting dusk.

Q. What did you observe when you arrived at the farm on September 12th, 1967?

* * *

A. We observed a male body on, I believe you would describe it, a dump or an area where there was a lot of trash that had been thrown.

* * *

TESTIMONY OF CLEON MAUER, from Exhibit C, Transcript of Proceedings of Trial in Fond du Lac County Court.

[380] CLEON MAUER, called as a witness herein on behalf of the State, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION By Mr. Semenas

* * *

[383] Q. Were you in Fond du Lac County on official business on Tuesday, September 11th, 1967? Strike that. September 12th that date should be. A. I was in Fond du Lac County on the 12th of September of 1967, on official business.

Q. When did you first come into Fond du Lac County on Tuesday, September 12th, 1967, for official business? A. At approximately 7:20 hours in the evening.

Q. Where did you go? Where did you go when you came into Fond du Lac County? A. I was escorted to a location by Deputy Harold Smet.

Q. Do you know where you were escorted to? A. Yes.

Q. Where were you escorted to? A. I was escorted to a field located in Auburn, Township of Auburn, north of County Trunk S near County Trunk G.

Q. Do you know any communities located in the general area? A. Kewaskum in Washington County.

Q. Now I show you Defendant's Exhibit 18, and would you look at that and tell us your route of travel to the place you went to on official business?

THE COURT: Are you so concerned about the route or the location?

MR. SEMENAS: I would just as soon have him show the route.

THE COURT: All right.

[384] THE WITNESS: I entered Fond du Lac County on County on County Trunk S coming from the direction of Kewaskum. At the junction of where County Trunk S turns to the right and County Trunk G continues on I turned right, and I went down this Country Trunk S a short distance, and the scene was pointed out to me, and we went to a location north of County Trunk S. This map here shows this area to be "C & B Dombrowski."

MR. SEMENAS:

Q. What did you observe when you first arrived at this scene that you related to show on the map to be the "C & B Dombrowski" farm or on the plat? A. When I arrived at this area, it was being guarded at the time by Deputies Jurgensmier and Huck. At this time, these deputies escorted me to a ravine area where I observed a body laying on a pile of what appeared to be a trash dump.

Q. Did anyone accompany you on your trip to this area? A. They did.

Q. Who was that? A. That was Mr. Kenneth Sundberg, a photographer from the Crime Laboratory.

Q. Who was in charge of your field unit? A. On this occasion I was.

* * *

[407] Whereupon, State's Exhibit No. 32 was marked for identification — Section of a floor mat.

Q. I have handed you, Mr. Mauer, State's Exhibit No. 32 for identification. Can you identify it? A. I can.

Q. What is it? A. Exhibit marked No. 32 consists of two plastic bags — one of which contains a section of floor mat; the other sealed bag contains a paper bag and is the bag in which I placed this section of floor mat at the time I recovered it from a 1960 2-door blue Dodge, bearing license number LB-428, Illinois, 1967.

MR. LEICHTFUSS: Are you reading now?

THE WITNESS: I am not.

A. (Continuing) I recovered this section of floor mat from the rear floor of that Dodge on the 13th of September of 1967.

* * *

[408] Whereupon State's Exhibit 33 was marked for identification — Attache case.

Q. Mr. Mauer, now I show you what has been marked as State's Exhibit No. 33 for identification and ask you if you can identify it? A. I can.

Q. What is it? A. Exhibit marked No. 33 is a sealed plastic bag containing a brown leather attache case and a brown paper bag. The brown paper bag is the bag in which I placed the attache case at the time I recovered it from the previously mentioned vehicle.

* * *

[410] Whereupon State's Exhibit 34 was marked for identification — Floor Mat.

Q. Mr. Mauer, now I show you what has been marked as State's Exhibit 34 for identification. Can you identify it? A. I can.

Q. What is it? A. Exhibit No. 34 is a sealed plastic bag containing a front floor mat and a brown paper bag. The brown paper bag is the bag in which I placed this floor mat at the time I recovered it from the previously described automobile on the 13th of September, 1967, at the Fond du Lac County Sheriff's Garage.

* * *

[414] Whereupon State's Exhibit 37 was marked for identification — white sock.

Q. Mr. Mauer, I show you what has been marked as State's Exhibit 37 for identification and ask you if you can identify it. A. I can.

Q. What is it? A. Exhibit marked No. 37 is a sealed plastic bag containing a white sock and a brown paper bag. The brown paper bag was the bag in which I placed this white sock at the time I recovered it on the 13th of September of 1967 from the previously described automobile.

* * *

[419] MR. LEICHTFUSS:

Q. Mr. Mauer, you said that you arrived in Fond du Lac County on the afternoon of the 12th of September, 1967; is that correct? A. I arrived at approximately 7:20 hours in the early evening hours of 12 September 1967.

Q. And you testified that you were escorted out to an area that you described as a farm area; is that right? A. That is correct.

Q. When you arrived there, did you park your truck or van or whatever you were driving? You parked it when you got there? A. I did.

Q. Did you park it? A. Just outside an enclosure; it appeared to be a fenced area; I parked it just outside of that area.

Q. Now, you said that you, yourself, made some recoveries from a car out in the farm area; is that true? A. No, sir.

Q. You did not yourself make any recoveries from a car in the farm area? A. I did not.

[420] Q. What about State's Exhibit 32, the section of floor mat? (Mr. Leichtfuss picks up State's Exhibit 32). I show you what has been marked for identification purposes as State's Exhibit 32; didn't you testify, Mr. Mauer, that you yourself recovered that from a 1960 Dodge, license number LB-428? A. I did.

Q. Well, what is the fact, did you recover that yourself? A. I did.

Q. When you recovered that piece of floor mat, Mr. Mauer, did you have authority to search that car? A. I did.

Q. What authority did you have? A. I was acting in the capacity of the Sheriff's Department of Fond du Lac County.

Q. So at the time you made the recoveries that you have described for us, it is your position you were acting in the capacity of a deputy sheriff of Fond du Lac County; is that right? A. I was assisting the deputy — the Sheriff's Department of Fond du Lac County.

Q. Your authority was as good as the department's only; isn't that true? A. That is true.

Q. Now, these items that you recovered, were they listed and attached to a search warrant of any kind? [421] A. Not to my knowledge.

Q. Did the Sheriff of Fond du Lac County know the items that you were recovering? A. A receipt was issued to the Fond du Lac County Sheriff's Department.

Q. Do you know of any reason why that was not attached to the search warrant? A. I do not know why.

Q. Now, Item 33 that you have described was an attache case; you also recovered that from the car, did you not? A. I did.

Q. Item 34 was a floor mat; did you also recover that, sir? A. There was more than one floor mat involved; I don't recall exactly which floor mat it was or—

Q. I will see if I can find it over here. (Mr. Leichtfuss picks up State's Exhibit 34). Did you recover that? A. I did.

Q. And you put it in that plastic bag as you did all the other exhibits that you recovered; isn't that right? A. I placed the floor mat in this paper bag which is contained within the plastic bag.

Q. You did not put them in the plastic bag they appear in now, however? A. I did not.

[422] Q. But you did recover this? A. I did.

Q. And again under the same authority that you have described to us? A. Yes.

Q. Was any search warrant ever shown to you, Mr. Mauer? A. I don't recall at the present time of actually seeing one; I was informed one had been issued.

Q. Didn't you ask to see one? A. No, sir.

Q. You made a notation that one was in existence? A. No, sir.

Q. I show you what has been marked for identification as State's Exhibits 37 and 36 — Those are two white socks, are they not? A. They are.

Q. You testified, I believe, that you found those out in the area of this farm that you were on; is that true? A. I recovered one of these items from the farm area.

Q. You recovered one? Which one? A. The one designated Exhibit 37.

Q. That was one that you recovered? Where did you find that, Mr. Mauer? A. Excuse me; Exhibit 36 is the one which I recovered at the farm area. Exhibit 37 is the one I recovered from the Dodge vehicle.

Q. You recovered from a Dodge vehicle Exhibit 37? A. I did.

[423] Q. Where did you find Exhibit No. 36? A. Exhibit 36 was at this farm scene.

Q. So you mean this area of this farm that you were on? A. The area which I previously described and referred to as the scene.

Q. You say— What caused the confusion in your mind? What marking are you referring to as to where one was found as compared to the other? A. I have indicated here a "P" designation — "turned over to Mr. John Linssen" and I have it marked as a white sock recovered on the 13th of September 1967.

Q. What do you have on State's Exhibit 37 for identification? A. 37 states a "white sock" recovered— However,

I do not have an Item "P" on it — and it contains the marking of Daniel Dowd.

Q. Did you give that to Mr. Dowd? A. I did.

Q. He never returned it to you, did he? A. No, sir.

Q. Where was this 1960 Dodge when you looked at it, Mr. Mauer? A. It was located in the Fond du Lac County Sheriff's Garage.

Q. So the 1960 Dodge you refer to as far as you know was only in the Fond du Lac County Sheriff's Garage; it was not at the farm, was it? A. I only saw it, observed it, at the Fond du Lac County Sheriff's Garage.

[424] Q. And that was on the 13th of September, 1967? A. Yes.

Q. Now, who was present in the Fond du Lac County Sheriff's Garage, Mr. Mauer, when you conducted your search of this car? A. I was there, Mr. Kenneth Sundberg was there, Deputy Sheriff Ray Howard was present, and there were others, but I do not know who those individuals are.

Q. Did you make notes of who the others were? A. Of all of them I did not.

Q. Now, isn't it customary for you to ask to see the authority by which you are searching a car? A. Not generally, no.

Q. Not generally? You do not usually ask to see that; is that it? A. I do not.

Q. You are solely directed by the Sheriff of the county who is telling you what to do? A. The Sheriff of the county in a case involving assistance to the particular county; if

the Sheriff or his representative advises me that a search warrant has been issued, then I accept that man's word at the time.

Q. And in partaking of that search warrant, you made out a receipt of the items that you recovered; is that right? A. I issued a receipt for the items that were recovered.

Q. Do you have a copy of that receipt with you? [425] A. I believe there is a copy attached to one of those reports; whether it is complete in its entirety I am not certain.

Q. Is this the report to which you have reference? (Report handed to the witness) A. It is.

Q. Do you want to take a moment and tell me if that is complete? (Witness goes through the report). A. Inasmuch as this receipt ends with the laboratory designation of AP, I do not know what the item AQ was; therefore, I cannot say if this is complete as to all of the items recovered from that particular vehicle.

Q. When was that receipt prepared, Mr. Mauer? A. I don't know when this was prepared.

Q. Did you prepare it? A. No, I did not.

Q. You are the one that recovered the items? A. I did.

Q. Isn't it customary for the one who recovers the item to prepare the receipt? A. The receipt?

Q. You can answer that "Yes" or "No." A. Not always. Not always in its entirety.

Q. Did you prepare any part of this receipt? A. I did not prepare any part of that receipt.

Q. Now, this receipt does not indicate any exhibits were returned, either, does it? A. It does not.

[426] MR. LEICHTFUSS: Does the Court record have the search warrant for the 1960 Dodge?

(Said search warrant handed to Mr. Leichtfuss)

Q. I show you what is part of the Court record here, Mr. Mauer, which is the return of the officer in the search of the 1960 Dodge, and I ask you to take a moment and look that over. Are those items listed in the receipt that is attached to your report? A. Some of these items may be on that receipt, but they are not in the area there that I indicated up to AP.

Q. You mean you didn't see them here or— Do you want to look at this? Maybe that will help. A. Some of the items contained in this endorsement of warrant are contained on the receipt form attached to this particular report.

Q. But they aren't all listed, are they? A. I don't know inasmuch as this report does not go straight through the alphabet in designating the items.

Q. My question is that they are not all listed? A. Based on the information I have would— No, they aren't.

Q. The information you have is your report, isn't it? A. My report is based upon the examinations which I conducted; I had no control over the receipt that may be attached to it in this particular case.

[427] Q. Even though you are the one that recovered the items? A. The items which you have just referred to me I did not recover.

Q. You search the Dodge, didn't you? A. I did.

Q. That's the items I just showed you on that warrant, weren't they? A. They are not the items which I recovered.

Q. Were you present when those were recovered? A. I was not.

Q. Do you know when they were recovered? A. I do not.

Q. But that's the warrant under which auspices you say you were conducting your search? A. I don't know.

* * *

[556] MR. SEMENAS:

Q. Mr. Mauer, would you look at State's Exhibit No. 41 for identification? (Witness does so). Can you identify it? A. I can.

Q. What is it? A. Exhibit marked 41 is the seat which I removed from a 1960 Dodge at the Fond du Lac County Sheriff's Garage on the 13th of September of 1967.

Q. Which seat is that? A. It appears to be the back seat.

* * *

[557] Q. Now, Mr. Mauer, would you look at State's Exhibit No. 42 marked for identification, and I ask you now if you can identify it? A. I can.

Q. What is it? A. Exhibit marked 42 is the front seat of a vehicle which I removed from a 1960 Dodge parked at the Fond du Lac County Sheriff's Garage on the 13th of September of 1967.

* * *

Q. And I will ask you to look at State's Exhibit No. 43 for identification, and I ask you, after you look at that, to tell me if you can identify it? A. I can.

Q. And what is it? A. Exhibit marked 43 is the back rest which I removed from a 1960 Dodge in Fond du Lac County on the 13th of September, 1967.

* * *

[564] RE-CROSS-EXAMINATION By Mr. Leichtfuss

Q. Mr. Mauer, when you removed State's Exhibits 41, 42 and 43 from the 1960 Dodge that you refer to, did you actually remove them yourself? A. I did not.

[565] Q. So you didn't remove them? A. Personally I did not remove them.

MR. LEICHTFUSS: That's all; thank you.

RE-DIRECT EXAMINATION By Mr. Semenas

Q. Mr. Mauer, were you present when these seats were removed? A. I was.

Q. State's Exhibits 41, 42, and 43? A. I was.

Q. And who supervised the removal of these seats? A. I did.

* * *

TESTIMONY OF PATRICK WHEALON, from Exhibit C, Transcript of Proceedings of Trial in Fond du Lac County Court.

[457] PATRICK WHEALON, called as a witness herein on behalf of the State, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION By Mr. Semenas

Q. Would you please state your name? A. Patrick Whealon.

Q. And where do you live? A. 34 Algoma, Fond du Lac.

Q. And what is your occupation: A. Part-time service station attendant and wrecker operator at Olsen's Service Station.

Q. Were you a part-time wrecker operator for Olsen's Service Station on September 12th, 1967? A. Right.

Q. Do you recall what hours you were on duty on September 12th, 1967? A. I came in that day about 5:30 and worked until almost midnight that night.

[458] Q. Did you have an occasion to go to the Kewaskum area on the evening of September 12th, 1967, while you were wrecker operator? A. Yes, we were called by the dispatcher on duty at the Safety Building to go out to County Trunk G & S and pick up a 1960 Dodge car for the Sheriff's Department.

Q. Did you go out there? A. Yes, I did.

Q. And what did you observe when you first arrived out there? A. Well, I got there and had to wait a little while. We went to this farm in the yard near the barn, and, at the orders of the Sheriff, we picked up this car and hauled it into Fond du Lac.

Q. Do you recall what type of car this was? A. 1960 Dodge, Illinois plates, blue.

Q. Do you recall the license number? A. I don't recall the number.

Q. Where did you haul this 1960 Dodge to? A. The Safety Building Garage behind the Safety Building.

Q. Do you recall what time you arrived at the Safety Building approximately? A. Oh, must have been close to 10:00 o'clock.

Q. Now, I show you Defendant's Exhibit No. 18 and ask you to look at that and tell us your route of travel in response to this call to go to that farm, if you can recall? [459] A. We went out Highway 45 to County Trunk Double S, and then we—County Double S to D, and we took D to County Trunk G and turned to the south, and went on G until we got to the G&S intersection, and then we went just past County Trunk S where S turned to go to New Fane, just past there to the farm, and then went, of course, in the driveway back next to the barn.

Q. Now, I show you State's Exhibit No. 16 for identification—

THE COURT: It has been received.

MR. SEMENAS:

Q. I show you State's Exhibit 16 and ask you to look at that a minute. Mr. Whealon, now I ask you is that a reasonable representation of the area that you responded to and received a call to go to on the evening of September 12th, 1967? A. Yes, it is just exactly where the car was parked in relation to the barn and the machine shed and the chicken coop.

Q. Mr. Whealon, after you were directed to this farm and to the location of the car, would you tell us what you did? A. Well, I contacted the Sheriff when I got out there. He was at the site of where the body was, and I contacted him, and then the Sheriff and the Undersheriff and the Coroner went with me to this automobile and we picked up the car at that time and brought it into the Safety Building.

Q. And after you brought it to the Safety Building, where did you leave it there? A. Locked up in the garage.

[460] Q. What portion of the garage? A. It was parked in the next stall to the ambulance in the Safety Building Garage.

Q. Which side of the Safety Building is that located on? A. North side of the Safety Building — County side of the Safety Building.

MR. SEMENAS: That's all the questions I have; however, I would like to re-call him later.

THE COURT: Do you have any cross-examination?

CROSS-EXAMINATION By Mr. Leichtfuss

Q. Mr. Whealon, what time did you receive this call that you referred to on the 12th of September, 1967? A. I would say it was about 7:30.

Q. P.M? A. Yes.

Q. So you were acting in response to a telephone call that you had received at 7:30 p.m? A. Right.

Q. Did you then immediately leave for the area that you have described? A. Within the next five minutes, or time to get the truck ready.

Q. What time did you get there? A. Oh, about, must have been about quarter after eight or [461] in that neighborhood.

Q. And when you arrived there did you see the Sheriff? A. Right.

Q. Did you see Deputy Sheriff Howard? A. Right.

Q. Did you see Mr. Decker? A. At that time I think Mr. Decker had gone into Kewaskum, if I am not mistaken.

Q. You didn't see him? A. Not right at that moment.

Q. You are sure you saw the Sheriff and Undersheriff at the time you arrived though? A. Right.

Q. And that was 8:15 p.m.? A. Approximately; I didn't look at my watch, but it was in that neighborhood, give or take 15 minutes.

Q. So you arrived, let's say, sometime between 8:00 p.m. and 8:30? A. I would say so.

MR. LEICHTFUSS: That's all, Mr. Whealon; thank you.

MR. SEMENAS: That's all the questions I have.

* * *

The following portions of testimony at pretrial motions, which are considered by petitioner to be unnecessary under Rule 36 (3), are printed at the request of the respondent, although they are not a part of the record on file with the District Court and not a part of the record filed with this Court.

SUPPLEMENTAL TESTIMONY OFFERED IN SUPPORT OF DEFENSE MOTIONS, TUESDAY, JUNE 4, 1968, FOND DU LAC COUNTY COURT

[2] RAYMOND J. HOWARD, called as a witness herein on behalf of the defendant, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION By Mr. Leichtfuss

* * *

[7] Q. And did you go onto the farm's property? A. That is right.

Q. Did you at that time know of your own personal knowledge who owned the farm? A. I knew; the Washington County authorities told me, yes.

Q. You were relying on what they had told you for your information at this point in time? A. That is right.

Q. Now, at the time you appeared at the farm and went on the premises did you have a warrant of arrest for this defendant? A. No.

Q. Did you have a search warrant? A. No.

Q. Did you look over all of the farm premises while you were there at this time? A. No.

Q. Did you observe a 1960 Dodge at any place on these premises? A. Yes.

Q. Was that located somewhere near the farm buildings and the farm home on those premises? A. Located near the barn.

Q. Did you go up to that automobile? A. That is right.

Q. Did you look into the automobile? A. Yes, I did.

[8] Q. Did you have a warrant of arrest for this defendant? A. No.

Q. Did you have a search warrant at that time? A. No.

Q. Do you recall what time of the day this was? A. Oh, I imagine it was about four o'clock — somewheres in there — between three and four.

Q. How long did you remain on the farm premises altogether? A. I wouldn't have any idea.

Q. Well, can you give me an approximation? A. I would say I was going and coming — going and coming back again; I imagine I would have been there about four hours total.

Q. Would this all be prior to 8:02 p.m. September 12th, 1967? A. No.

Q. How much of that time would be prior to 8:02 p.m. on that date? A. Oh, I would say about three hours.

Q. Now, when you testified in Judge McEssy's court on that evening were you asked this question and did you give this answer?

THE COURT: What page?

MR. LEICHTFUSS: I am on Page 2, Your Honor, of the testimony attached to the search warrants. For the 1960 Dodge I am reading from Page 2, bottom of the page.

[9] QUESTION: Why do you want to examine this automobile or search it?

ANSWER: Because a man by the name of Chester Dombrowski had an accident just south of the Fond du Lac County line last night in which Washington County arrested him for drunken driving; and in so arresting him, they searched the car, and they found the floormat from the back of a Dodge car filled with blood and a raincoat, and a combination penknife and letter-opener; and while questioning the subject in Washington County, he demanded an attorney and said he would then give a statement. Afterwards, he would not give a statement, but the attorneys made remarks that there would be a body found on the brother's farm, which is located in Fond du Lac County.

MR. LEICHTFUSS: Were you asked that question and did your give that answer?

THE WITNESS:

A. That sounds like my anwer, yes.

Q. Now, Officer Howard, does that answer contain any information when you had personal knowledge of, or were you relying completely on information you had received from the Washington County authorities? A. That information was relied on my personal observations and information from the Washington County authorities, and at that present time, the defendant's attorney.

Q. Well, with reference to the arrest of the defendant for an accident south of the county line and the charge of drunken driving, were you relying on information given to you by the Washington County authorities? A. Yes.

[10] Q. With reference to the search they conducted and the items they claimed to have found in that car, were you relying on the information they gave to you? A. Yes.

Q. The statement about the questioning of the subject in Washington County and his demand for an attorney, was that your questioning of the defendant? A. No.

Q. Were you again relying on information furnished to you by Washington County authorities? A. Yes.

Q. When you say afterwards he would not give a statement, were you relying on your own information or that given to you by the Washington County authorities? A. I don't recall if it was mine or theirs.

Q. With reference to attorney's remarks and the fact a body would be found on the brother's farm which is located in Fond du Lac County, were those remarks by an attorney made to you? A. No.

Q. So you were relying again on information furnished to you by Washington County authorities; is that true? A. That is right.

Q. So reference to this entire answer, you were relying on information furnished you by the Washington County authorities; isn't that true? [11] A. All except what I seen in the 1960 Dodge.

Q. There is nothing in this answer I read to you, Officer Howard, that relates to contents in the 1960 Dodge? I am talking about that one answer now. A. No.

Q. You may check it if you wish. (Transcript handed to the witness). Did you at any time prior to applying for this search warrant check the ownership of that farm personally? A. No.

Q. So when you say that the farm is located in Fond du Lac County you were relying again on somebody else's information; is that correct? A. That is right.

Q. Now, with reference to the location of the 1967 Ford Thunderbird, did you know where that was located at the time you were applying for this search warrant? A. Yes.

Q. You knew it was not located in Fond du Lac County I take it? A. Yes.

Q. But you had not seen the vehicle? A. I don't recall whether I stopped and looked at it or didn't before I came up here. I was running between the farm and West Bend.

[12] Q. Did you at any time check with either the defendant or any other member of the Dombrowski family and ask their permission to go on the farm premises? A. No.

Q. Did you know who owned the 1960 Dodge parked on the farm premises? A. No.

Q. Did you know who owned the 1967 Ford Thunderbird when you applied for the search warrant? A. Yes.

Q. Did you know by information you gained yourself or told to you by somebody else? A. I had seen the rental contract.

Q. Where had you gotten that from? A. Washington County Sheriff's Department.

Q. They turned that over to you? A. No, but I was shown it.

Q. They had retained custody of it but let you read it; is that right? A. That is right.

Q. At any time when you were present prior to the issuance of a search warrant, did the defendant make any request or demand of you? A. No.

Q. Did you search the 1960 Dodge vehicle located on the farm premises prior to Officer Sondergard applying and receiving [13] a search warrant to search the premises? A. Did I search the Dodge before he? Yes.

Q. In other words, you went on the premises and searched the Dodge prior to the time he had a search warrant for the premises; is that right? A. That is right.

Q. Was the Wisconsin State Crime Laboratory on the premises prior to your obtaining these search warrants? A. That I can't say.

Q. Did you ever obtain a search warrant to search the premises for a body? A. No.

Q. When did you go out to the 1960 Dodge with your search warrant, Officer? A. Right after we left the court room.

Q. That evening? A. Yes.

Q. Did you make your return to the court that evening, or when did you make your return to the court? A. Return was made by the Sheriff, I believe and I wasn't there when he made the return. . .I made the return, yes. It said "Sheriff," and they changed it, and I made the return.

Q. Do you recall what time of the day on the 13th of September, 1967, you made that return? A. 8:15.

[14] Q. In the morning? A. I don't remember what time of the day I made the return off hand.

Q. When was the car, the 1960 Dodge, removed from the farm premises? Do you recall that? A. Yes, that same night that I made the search.

Q. At what time? A. I wouldn't know because I was in West Bend at the time the wrecker got there and took the 1960 Dodge.

Q. Were you in West Bend for purposes of executing the search warrant for the 1967 Ford Thunderbird? A. Yes.

Q. You searched the 1960 Dodge before searching the Thunderbird? A. Yes.

Q. Now, in searching the 1960 Dodge, the items you obtained are listed in your return; is that correct? A. (No answer).

Q. I show you the search warrant and return attached thereto that has reference to the 1960 Dodge; is that your signature, "Raymond Howard"? A. Yes.

Q. Did you fill the date in — the 13th of September, 1967? A. No.

* * *

[15] Q. Was it dated on the same date you signed this document? A. Yes.

Q. Were those items listed there the items you found in the search of the 1960 Dodge? A. Yes.

Q. Now, you did not find books of matches partially burned and a fresh pile of straw in the car, did you? A. No.

Q. Those, in fact, were found outside of the car on the premises; is that correct? A. Right.

Q. And the necktie also was found outside the car on the premises? A. That is right.

Q. Those items, in fact, were not found within the car, were they? A. No.

* * *

[21] Q. When you applied for the search warrant to Judge McEssy, did you tell him specifically what you were looking for in the 1960 Dodge? A. Yes, I told him there was—that there was something covered up on the back seat.

Q. Is that in this testimony here? A. I don't believe it is.

Q. You mean you told him things that are not recorded in this testimony that is attached to the warrant? A. Well, I told him that — I don't see it here in the testimony — but I remember telling him that through the car windows we could see blood on the back seat and so forth.

* * *

[26] DANIEL R. SONDERGARD called as a witness herein on behalf of the defendant, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION By Mr. Leichtfuss

Q. Would you state your name sir? A. Daniel R. Sondergard.

Q. What is your employment? [27] A. Fond du Lac County Traffic Officer.

Q. Were you so employed in that capacity on September 12th and 13th, 1967? A. Yes, sir, I was.

Q. Did you have occasion on the 13th day of September, 1967, to appear before the Honorable H. W. McEssy, County Judge, Fond du Lac County? A. Yes, sir, I did.

Q. Would I be correct in stating you appeared about 9:35 a.m. on the morning of September 13th, 1967? A. That's the approximate time, yes, sir.

Q. At that time were you requesting that a search warrant be issued for certain premises? A. Yes, sir, I was.

Q. Now, you had been on those premises, I believe, previously to that time, had you not? A. Yes, sir, I was.

Q. When was that? A. The afternoon and evening of September 12th, 1967.

Q. Can you tell us between what hours you were on those premises on September 12th, 1967? A. Not continuously, but between the hours of approximately 3:00 and 11:00 or 12:00 p.m.—the greater portion of the time.

Q. Now, during the course of your being on the premises on that date, did you have occasion to look into a [28] home that you had believed to be owned by C. Dombrowski or B. Dombrowski? A. Yes, sir, I did.

Q. Did you know who owned the farm at that time? A. I was informed by the people who were living in it.

Q. All the information you had was information you had received from the people who were living in that farm with reference to the ownership of it; is that right? A. That is correct, yes.

Q. Now, did you, in fact, participate in the search, and did you yourself find a body on the farm on September 12th, 1967? A. Yes, sir, I did.

Q. Was that as the result of the search you were participating in? A. Yes, sir, it was.

Q. Did you have a search warrant? A. I had none;

* * *

Q. So the answer to my question is that you had none? A. No, I had none.

[29] Q. Did you have a warrant for the defendant's arrest? A. At what time?

Q. At the time you found the body? A. No, sir, I didn't.

Q. You say you personally found the body; is that correct? A. That is correct.

Q. What time of the day was that? A. I would say approximately 3:00 or shortly after 3:00 in the afternoon — 3:00 or 3:30 p.m.

Q. Approximately how many hours thereafter did the Wisconsin State Crime Laboratory arrive? A. At the time of the arrival I wasn't at the scene.

Q. Were they there when you returned to the scene? A. Yes, sir, they were.

Q. What time was that? A. I couldn't give you the exact time. I wouldn't know.

Q. Give me your best estimate? A. I believe it would be sometime in the area of — oh, 6:30 to 8:00 o'clock.

Q. P.M. on the date of September 12th, 1967? A. Yes, sir.

Q. Did you call them to come over to the farm? A. I didn't call the Crime Laboratory personally, no, sir.

Q. Now, in requesting— Were you directed to request a search warrant on September 13th, 1967? Did somebody direct you to go before Judge McEssy to get a search warrant for the premises? [30] A. I couldn't truthfully say if I was directed. I looked in the building and I saw these things; if I was directed, I couldn't tell you who did it.

Q. When you say you saw these things, and with reference to that statement, and referring to Page 1 and 2, Your Honor, of the testimony attached to the search warrant for the farm, etc., the last question on Page 1, were you asked this question and did you give this answer:

THE COURT: I just handed Mr. Sondergard the original transcript.

MR. LEICHTFUSS: Then I will withdraw that question and rephrase it this way, Your Honor, if I may.

Q. On page 2 with reference to your answer at the top of that page, Officer Sondergard, does that describe the observations you made through the window of the farm building on the premises you described as being owned by either C. Dombrowski or B. Dombrowski? A. Yes, sir, it does.

Q. And those observations were gained by you sometime in the afternoon of September 12th, 1967; is that correct? A. The afternoon and evening.

Q. Now, with reference to the results of your search, Officer, you made a return, did you not? A. Yes, sir, I did.

Q. And that return is affixed to the warrant that you have before you there? A. If it is, I can't see it. (Witness looks over document).

[31] Q. Is that your signature? A. Yes, it is.

Q. You signed that on what date? A. The return?

Q. Yes, sir. A. That would have been on the 15th.

Q. Even though it is dated the 14th? A. Yes, sir. I had 48 hours to return it.

Q. You were directed to search forthwith, were you not? A. Yes, sir, I was; they gave me 48 hours to make a return on the search warrant.

Q. The warrant says "You are commanded to search said premises," — A. That's what we did, yes.

Q. You immediately, upon receiving the warrant, searched the premises? A. After when we got to the farm, yes.

Q. What time did you arrive at the farm on that date?

THE COURT: After the warrant?

MR. LEICHTFUSS: Yes, sir, I am sorry — After the warrant issued by Judge McEssy, did you immediately go back to the farm with the warrant?

THE WITNESS:

A. I would say it was roughly 10:30 or so when we got there.

Q. At that time had the 1960 Dodge been removed? A. Yes, sir it was.

* * *

CERTIFICATE OF SERVICE

I, the undersigned, a member of the Bar of this Court, do hereby certify that on January 23, 1973, I duly mailed three copies of Appendix to counsel for the respondent, addressed as follows:

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FILE COPY

OCT 11 1972

MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1972

No. 72-586

ELMER O. CADY,
Petitioner,

v.

CHESTER J. DOMBROWSKI,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1972

No. _____

ELMER O. CADY,

Petitioner,

v.

CHESTER J. DOMBROWSKI,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The petitioner, Elmer O. Cady, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on June 2, 1972, rehearing denied on July 24, 1972.

FOLDOUT(S) IS/ARE TOO LARGE TO BE FILMED

OPINIONS BELOW

The opinion of the Court of Appeals, not yet reported, appears in the appendix hereto. The opinion of the District Court for the Eastern District of Wisconsin is reported as *Dombrowski v. Cady* (1970), 319 F. Supp. 530.

JURISDICTION

The judgment of the Court of Appeals for the Seventh Circuit was entered on June 2, 1972. A timely petition for rehearing en banc was denied on July 24, 1972, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254 (1).

QUESTIONS PRESENTED

1. Is a police officer engaged in a "search" within the meaning of the Fourth Amendment when, seeking to locate property of a person under arrest for drunk driving, he opens the trunk of the person's disabled vehicle and discovers what later develops to be evidence of a murder of which he had no previous knowledge or suspicion?

The Court of Appeals held in the affirmative.

2. If the first question is answered in the affirmative, is such a search "unreasonable" within the meaning of the Fourth Amendment?

The Court of Appeals held in the affirmative.

3. Where a judge issues an order for the search and an order for impounding of a vehicle for evidence of the crime of murder and the vehicle is thereafter seized and removed to a police garage, is evidence obtained in the search the following day admitted at trial in violation of Fourth Amendment rights?

The Court of Appeals held in the affirmative.

STATEMENT OF THE CASE

The respondent was convicted by a jury on July 18, 1968, of first-degree murder and was sentenced to life imprisonment. The Wisconsin Supreme Court affirmed the jury conviction, *State v. Dombrowski* (1969), 44 Wis. 2d 486, 171 N.W. 2d 349.

This habeas corpus proceeding followed and the District Court denied the writ following the Wisconsin Supreme Court's opinion holding that Dombrowski's Fourth Amendment rights were not violated.

Appeal was taken to the United States Court of Appeals for the Seventh Circuit and on June 2, 1972, that court ruled that the respondent's Fourth Amendment rights were violated in the obtaining of evidence introduced at his trial.

At about 10:30 p.m. on September 11, 1967, the respondent, a Chicago police officer off duty, was involved in a one-car automobile accident in which the vehicle, a leased 1967 Ford Thunderbird, was rendered inoperative north of Kewaskum, Wisconsin. After being arrested for drunk driving Dombrowski pleaded for consideration because of his police officer status. Subsequently, after respondent had been taken to a hospital because of injuries, intoxication, and incoherency, one of the investigating officers, William Weiss of the Washington County, Wisconsin, Sheriff's Department, returned to the Ford Thunderbird which had been towed and parked *outside** of Honeck's Garage in Kewaskum in an attempt to locate respondent's service revolver which he understood Chicago police

---

* It is not clear whether the Circuit Court of Appeals understood this important fact. State's brief in response to motion to suppress filed with trial court June 6, 1968.

officers were required to carry with them at all times. When Officer Weiss returned to the unattended vehicle he inspected the inside and found a book of rules and regulations of the Chicago Police Department but no gun. Then, still looking for the service revolver, Officer Weiss opened the trunk of the car. There he discovered a number of blood-covered items, including a pair of uniform pants, a pair of grey trousers, a policeman's nightstick with the name Dombrowski stamped on it, a uniform raincoat, a car-floor tarp or mat, a pail and towel, and numerous other items. The blood on some of these items was dry, but on others, particularly the car-floor mat, was still wet. While still under arrest for drunken driving, the respondent was questioned concerning the blood-covered items recovered from his vehicle. He asked to confer with an attorney and subsequently the attorney, under the respondent's directions, informed the Washington County District Attorney that there was a body lying near the family picnic area at the north end of his brother's farm. Shortly thereafter the dead body of a white male was found lying in a dump area of the farm. A single white sock was found near the body.

Subsequently, one of the investigating officers looked through the windows of a Dodge automobile parked in the farmyard. He saw a blood-covered briefcase on its floor. The back seat of the car and the back of the front seat of the car were also splattered or covered with blood. A search warrant was issued by the county judge at 8:15 p.m. for the Dodge vehicle and the judge ordered the sheriff to impound the vehicle. That evening the vehicle was towed to the sheriff's garage at Fond du Lac where it was marked as Exhibit #40 at the trial and still is being held as evidence.

The following morning, September 13, 1967, experts called in from the State Crime Laboratory by the sheriff removed all of the bloodied contents of the Dodge, including the back seat, front seat, backrest of back seat, a white sock, a portion of the floor mat in rear, attache case, and front floor mat, all of which were taken to the Crime Laboratory for clinical tests and later returned to the sheriff.

The search warrant had not been returned at the time of Mauer's search and was not *functus officio* as stated in the decision of the lower court. A partial, incomplete return was typed on September 13, 1967, but was not filed with the court until an appearance before the county judge when a formal return was made with sworn testimony taken, recorded, and transcribed by the official court reporter on September 14, 1967.

All of the bloodied items found in the search of the Dodge, as well as the items found in the trunk of the Thunderbird, were introduced and accepted as evidence at the trial.

In this habeas corpus proceeding and at trial the respondent contended that the items from the Thunderbird and the sock and partial floor mat from the Dodge were received in evidence in violation of his Fourth Amendment rights against unreasonable search and seizure.

Further facts are stated in the petition and in the opinion of the United States Court of Appeals for the Seventh Circuit contained in the appendix.

REASONS FOR GRANTING CERTIORARI

I. The Decision Below Conflicts With Decisions Of This Court.

A. The officer did not conduct a "search" of the Thunderbird.

Where a police officer is not searching for evidence, but inadvertently comes across evidence which turns out to be incriminating, this court has repeatedly held that the "plain view" doctrine applies. Most recently, in *Coolidge v. New Hampshire* (1971), 403 U.S. 443, 29 L.Ed. 2d 564, 91 S.Ct. 2022, this court said, 29 L.Ed. 2d 583:

> "* * * Finally, the 'plain view' doctrine has been applied where a police officer is not searching for evidence against the accused, but nonetheless inadvertently comes across an incriminating object. Harris v United States, 390 US 234, 19 L Ed 2d 1067, 88 S Ct 992; Frazier v Cupp, 394 US 731, 22 L Ed 2d 684, 89 S Ct 1420; Ker v California, 374 US, at 43, 10 L Ed 2d 743. Cf. Lewis v United States, 385 US 206, 17 L Ed 2d 312, 87 S Ct 424.
>
> "What the 'plain view' cases have in common is that the police officer in each of them had a prior justification for an intrusion in the course of which he came inadvertently across a piece of evidence incriminating the accused. * * *"

In *Harris v. United States* (1968), 390 U.S. 234, 88 S.Ct. 992, 19 L.Ed. 2d 1067, this court held that evidence discovered inadvertently by the officer while performing custody functions relating to an impounded vehicle was not the result of a search of the car but a measure taken to protect the car while it was in police custody.

Thus, if there is no search, then no violation of constitutional rights. The Fifth Circuit Court of Appeals in *Haerr v. United States* (1957), 240 F. 2d 533, 535, coined the most quoted definition of the term "search":

> "A 'search' implies an examination of one's premises or person with a view to the discovery of contraband or evidence of guilt to be used in prosecution of a criminal action. The term implies exploratory investigation or quest. * * *"

The above definition was applied by the Supreme Court of Wisconsin in this case in determining that there was no search at the time Officer Weiss made his inspection of the Thunderbird at the Kewaskum garage.

As in *Harris*, supra, the officer in this case was questioned closely at trial as to his purpose in going to the Thunderbird and opening the trunk of the vehicle. The following facts clearly establish the reasons for Officer Weiss's actions and justify those actions:

1. He understood that he had a duty under his department's "standard procedures" to secure in a place of safety property of persons in custody of his department.

2. Dombrowski repeatedly asserted his status as a Chicago police officer.

3. Officer Weiss understood that Chicago police officers carried their weapons with them at all times.

4. Dombrowski's damaged Thunderbird was left outside of Honeck's garage about seven miles from the sheriff's office and no guard was posted.

5. Dombrowski became incoherent at the hospital and could not be communicated with at the time.

6. Officer Weiss had no knowledge of Dombrowski being involved in a murder or any other crime except drunk driving.

The actions of Officer Weiss were litigated in a pretrial motion where Dombrowski was given every opportunity to establish the facts as to prior justification and inadvertence in connection with the discovery of the bloody items in the trunk of the Thunderbird. The judge, after considering all of the evidence, concluded that Officer Weiss was justified in his conclusion that he should attempt to locate Dombrowski's service revolver and the discovery of the evidence of murder was inadvertent. Again at trial the issue was litigated. A voir dire examination of Officer Weiss was conducted outside of the presence of the jury (Record Exhibit C, p. 46) and again Dombrowski was given the opportunity to test if Officer Weiss's motivations were other than to secure the property of Dombrowski in a safer location than a disabled automobile standing outside of a garage in the nighttime. Again the trial judge concluded there was prior justification and the evidence was inadvertently discovered. This situation where the trial judge closely examined the officer's acts is very similar to the trial court's actions in *Harris,* supra. The Court of Appeals for the District of Columbia noted this thorough action of the trial court in its decision in that case, *United States v. Harris* (1966), 370 F. 2d 477, 478, Note 3. This court approved of such precise and detailed findings. *Harris,* 19 L.Ed. 2d 1069.

This court recently denied certiorari where prior justification and inadvertence resulted in the discovery of evidence of crime in connection with police inventory procedures. *Cabbler v. Virginia* (1972, — U.S. —, 92 S.Ct. 1501, — L.Ed. 2d —. The Supreme Court of Virginia had held that police

department inventory practices designed to protect property of a citizen arrested away from home did not violate Fourth Amendment rights.

B. If there was a search, it was reasonable.

1. *Coolidge* standard misinterpreted by lower court.

The lower court stated at page 4, slip opinion, App. 105:

> "Under *Coolidge v. New Hampshire,* 403 U.S. 443 (1971), warrantless searches are per se unreasonable. * * *"

Then, emphasizing that there are few exceptions, the court stated that to come within the exceptions it must be shown that the exigencies of the situation rendered the warrantless search imperative. It appears that the lower court is applying a standard much more strict than anticipated by the court in *Coolidge,* at 454-455. To adamantly insist that *Coolidge* teaches such strict doctrine would be to write out the dicta cited, supra, from *Coolidge* that the "plain view" doctrine is operative when coupled with inadvertence and prior justification for intrusion in a private area.

2. The lower court was not justified in changing trial court findings.

The Supreme Court of the State of Wisconsin agreed with the findings of the trial judge; the District Court for the Eastern District of Wisconsin agreed with the trial judge; and it was not until four years later that a split court of the Seventh Circuit Court of Appeals concluded, without evidence

in the record to substantiate such conclusion, that "* * * the search must therefore have been for incriminating evidence of other offenses." Thus, the Court set aside the findings of the District Court that the examination of the car at the garage was designed to locate an article of value to be protected by those responsible for its custody. The findings of the District Court, which were concurrent with the state trial court's findings, were not "clearly erroneous" within the meaning of Rule 52 (a) of the Federal Rules of Civil Procedure. *Berenyi v. Immigration and Naturalization Service* (1967), 385 U.S. 630, 87 S.Ct. 666, 17 L.Ed. 2d 656; *Graver Tank and Mfg. Co. v. Linde Air Prod. Co.* (1948), 336 U.S. 271, 69 S.Ct. 535, 93 L.Ed. 672.

Courts of appeal should not reweigh the evidence and findings concerning credibility. *United States v. Iaculla* (7th Cir., 1955), 226 F. 2d 788, 795, cert. den. 350 U.S. 966.

C. *The search of the Dodge was in accordance with constitutional requirements.*

The court below seems to be confused as to the sequence of events which led up to Mauer, the Crime Laboratory specialist, taking up the piece of floor mat and the bloody sock in the Dodge and labeling them on September 13, 1967. The court concluded:

> "There was no continuing authority under the warrant issued the previous night. First, these items were not described in the warrant and presumably were not observed that night. Second, when the warrant was returned—before Mauer came on the scene—it was *functus officio.* A 'new ball game,' so to speak, began when Mauer made his 'inspection.' " (Slip opinion, p. 9, App. 111.)

A complete examination of the file, including the trial record and the proceedings conducted by the county judge prior to the issuance of the search warrant, indicates that the judge ordered not only that a search warrant be issued for the Dodge but that the vehicle be impounded (Record Exhibit A, p. 18). Thereafter, that evening, the sheriff's office contacted a wrecker service, had the Dodge towed to the police garage in Fond du Lac where the search was conducted the next morning by the sheriff's representatives and representatives of the State Crime Laboratory from Madison who had been called in to assist the sheriff in the professional search of the vehicle for evidence of murder (Record Exhibit C, p. 463).

It was at this time, the morning of September 13, 1967, that Mr. Mauer; the undersheriff of Fond du Lac County, Raymond Howard; and Mr. Sundberg from the Crime Laboratory removed from the Dodge vehicle, which had been towed into the sheriff's garage, all of the bloodied contents of the Dodge, including the back seat, front seat, backrest of the back seat, a white sock, a portion of the floor mat in the rear, an attache case, and the front floor mat, all of which were taken to the Crime Laboratory for clinical tests and later introduced in evidence at the trial.

A formal hearing on the return of the search warrant was held before the county judge on September 14, 1967. (Record Exhibit A, pp. 22-26).

Testimony at trial from Mr. Mauer established that all of the bloodied items from the Dodge were removed on the morning of September 13, 1967. Therefore, the court below was in error in concluding that the warrant was returned before Mauer came on the scene.

Therefore, as to all of the evidence found in the Dodge, the sequence for search and seizure was the same. The undersheriff looked into the vehicle, saw what appeared to be blood on a briefcase and the back seat, went to a judge to secure a search warrant, called in the experts from the Crime Laboratory to help conduct the search of the vehicle, obtained the search warrant and the oral order to impound, took the vehicle to the sheriff's garage after dark on September 12, 1967, and conducted the search on September 13, 1967. Mauer saw what appeared to be blood on the floor mat and on the sock, which were in plain view when he opened the doors of the Dodge. The sheriff and his assistants were conducting an authorized search of a piece of evidence—the vehicle.

Again in the case of the search of the Dodge the lower court has changed trial court findings without such findings being "clearly erroneous" within the meaning of Rule 52 (a), Federal Rules of Civil Procedure.

II. There Is A Conflict Among The Courts Of Appeal On What Constitutes A Search.

In *United States v. Mitchell* (9th Cir., 1972), 458 F. 2d 960, the court held that where the defendant's automobile had been lawfully impounded the discovery of a revolver by a police officer while placing a number of valuable watches into an open sample case on the floor of the auto did not constitute an unlawful search and seizure since the officer was performing the reasonable police function of protecting the defendant's personal property.

In *United States v. Ware* (7th Cir., 1972), 457 F. 2d 828, the United States Court of Appeals for the Seventh Circuit

held that checking the confidential vehicle identification number stamped on the frame of the motor vehicle that "* * * the totality of the circumstances was sufficient to give the officers the right to search, if, indeed, this was a search." Judge Kiley, the author of the opinion in the instant case, dissented, pointing out "* * * It is noteworthy that the police also searched the trunk and the interior of the car while looking for the confidential vehicle identification number."

See also *DiMarco v. Greene* (6th Cir., 1967), 385 F. 2d 556; *United States v. Dento* (3rd Cir., 1967), 382 F. 2d 361; and *United States v. Blackburn* (6th Cir., 1968), 389 F. 2d 93.

III. The Decision Below Is In Direct Conflict With Public Policy As Established By The Highest Court Of The State Of Wisconsin And Other State Courts.

The trial judge, the Wisconsin Supreme Court, and the District Court all found that the inspection of the Thunderbird was accomplished while the police were responsible for its protection and were in the process of protecting Dombrowski's property and were not at that time engaged in the search of the car looking for incriminating evidence so as to violate Dombrowski's Fourth Amendment rights.

In *Cabbler v. Virginia*, supra, Cabbler had been arrested by the Roanoke Police Department for shooting into an occupied dwelling. He was taken into custody and his automobile was parked in such a manner as to partially block the ambulance driveway leading to a hospital emergency entrance. After Cabbler's arrest, the automobile was removed from the hospital driveway to the city garage for safekeeping until

Cabbler's release from custody. Being stored in the city garage, the vehicle was taken to the property room where the contents of the car were to be removed, inventoried, and stored for safekeeping. It was then that the police discovered stolen goods that resulted in Cabbler's later convictions.

For other cases approving the use of evidence discovered inadvertently while inspecting or searching under prior justification, see *Commonwealth v. Haefeli* (1972), — Mass. —, 279 N.E. 2d 915; *Aaron v. State* (1971), — Del. Supr. —, 275 A. 2d 791; and *People v. Lanthier* (1971), 97 Cal. Rptr. 297, 488 P. 2d 625.

IV. The Effect Of The Decision Below Is Undesirable.

Mr. Chief Justice Burger in his dissent in *Bivens v. Six Unknown Federal Narcotics Agents* (1971), 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed. 2d 619, 636, in referring to the questionable deterrent value of the exclusionary rule, quoted from Mr. Justice Cardozo's statement in *People v. Defore* (1926), 242 N.Y. 13, 21, 23-24, 150 N.E. 585, 587, 588:

> "The criminal is to go free because the constable has blundered. . . . A room is searched against the law, and the body of a murdered man is found. . . . The privacy of the home has been infringed, and the murderer goes free."

If this is the case where society must prevent the introduction of the bloody items seized from Dombrowski's Thunderbird under the exclusionary rule to punish Officer Weiss for allegedly violating Dombrowski's Fourth Amendment rights, then it appears that society is paying a tremendous price in a futile attempt to teach an officer a lesson for doing what he thought was his duty.

But what are we trying to teach Officer Weiss? Are we saying that he should not attempt to secure the property of a person who is incapacitated and in the custody of his department? Or is society telling Officer Weiss that he should have gone to a judge to determine if he could get a search warrant to inspect the Thunderbird? Of course it is obvious that under the facts as they existed, no search warrant could be legally issued.

What we are saying, then, is that we will not allow fate or divine providence, or whatever we want to call such a force, to assist in the discovery of a heinous crime.

If the lower court decision is allowed to stand, valuable and possibly critically necessary pieces of evidence from the Thunderbird and the Dodge cannot be used in evidence. In addition, it would appear that under the "fruit of the poison tree" doctrine the accused could bar all evidence subsequently discovered as the result of the faulty seizure of evidence in the Thunderbird.

If Dombrowski, the murderer, goes free, what benefit are we thereby accruing to society? Is the theory of the exclusionary rule here applied, that Officer Weiss and thousands of other officers throughout the country will refrain from attempting to locate property of one under arrest either valid or desirable? Would accurate, definitive word filter down to the police officer on the street who is faced with making the ultimate decisions on short notice at odd hours without a lawyer present to consult with?

Again, Mr. Chief Justice Burger answered that question in his dissent in *Bivens*, supra, when he pointed out that the theoretical educational effect of higher court decisions is greatly diminished in fact by the realities of law enforcement work.

Would we want Officer Weiss to cease any further inventory inspections in situations where the incoherent motorist has just advised the officer that he sells diamonds to jewelry stores in the area? Or what if he said he was a drug salesman?

It is submitted that the decision below that Dombrowski's Fourth Amendment rights were violated by improper seizure of evidence in the Thunderbird is based upon an erroneous finding that Officer Weiss was looking for incriminating evidence of other offenses. As to the Dodge, the court below erroneously concluded that the search warrant had expired and was *functus officio*. It is unfortunate that the court did not avail itself of the trial transcript and Record Exhibit A before adopting findings contrary to the trial court.

CONCLUSION

It is therefore respectfully submitted that certiorari should be granted and that in the alternative: (1) The decision below be summarily reversed. (2) The case be remanded for further proceedings. (3) The case be argued fully on the merits, including the wisdom of the exclusionary rule.

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APPENDIX

Decision of the Court of Appeals reversing the District Court judgment with direction to grant the writ of habeas corpus unless the Wisconsin authorities grant the petitioner a new trial within a reasonable period to be set by the District Court.

IN THE

United States Court of Appeals

For the Seventh Circuit

September Term, 1971 — January Session, 1972

No. 71-1094

Chester J. Dombrowski,
Petitioner-Appellant,

v.

Elmer O. Cady,
Respondent-Appellee.

Appeal from the United States District Court for the Eastern District of Wisconsin.
No. 70-C-129
Myron L. Gordon, *Judge.*

Argued January 19, 1972 — Decided June 2, 1972

Before Knoch, *Senior Circuit Judge,* Kiley and Fairchild, *Circuit Judges.*

Kiley, *Circuit Judge.* The district court denied petitioner Dombrowski habeas corpus relief from his imprisonment in Wisconsin for murder. We reverse.

Dombrowski, a Chicago policeman, on September 9, 1967, drove his 1960 Dodge to Fond du Lac, Wisconsin, to visit his brother's farm. That evening the Dodge was disabled and on September 10 was towed to the farm, where Dombrowski left it. He returned to Chicago with his brother. In Chicago, at 12:30 a.m. September 11, Dombrowski rented a 1967 black-over-maroon Ford. Dombrowski was seen about 9:40 a.m. purchasing two hand towels in Kewaskum, Wisconsin.

About 10:30 p.m. that night Dombrowski drove the Ford off a highway and crashed into a bridge abutment. A passerby took him to Kewaskum where Dombrowski notified the sheriff's office about the Ford mishap. Two deputies drove him to the scene of the accident, and on the way he told them that he was a Chicago policeman.

At the scene one of the deputies searched the inside of the Ford, looking for defendant's service revolver. The trunk was not searched. The Ford was locked by a deputy, who kept the keys, and the Ford then was towed to a private garage in Kewaskum. Dombrowski was taken to the sheriff's office in West Bend where he was "arrested" for "drunken driving" and taken to the West Bend hospital.

After leaving the Ford, one of the deputies, at approximately 2:13 a.m., went to the Kewaskum garage and—without the knowledge or consent of Dombrowski—made a warrantless search of the Ford. The deputy seized from the trunk, *inter alia*, a towel, a piece of a floor mat, a night stick and a police officer's uniform pants. All items were spattered with blood.

Dombrowski, while in the hospital during the morning of September 12, retained an attorney from West Bend. The attorney conferred with Dombrowski at the hospital and then informed the local county prosecutor that a body could be found on Dombrowski's brother's farm. At about 3:00 p.m. Washington and Fond du Lac County sheriff's officials went to the farm and conducted an extensive warrantless search. In the search a dead body was found in the dump area about three blocks from where the Dodge was parked. Near the body a white sock was found.

One officer peered into Dombrowski's Dodge and saw the back seat saturated with what appeared to be blood, and a briefcase stained with blood. The Dodge, however, was not searched at the time. A warrant was obtained at about 8:00 p.m. and the car seat and briefcase were seized. The next

morning, September 13, another search was made and a bloodied sock and piece of floor mat were seized. The items seized in the search of the Ford early on September 12 and in the searches of the Dodge were admitted into evidence, over objection, at the Dombrowski trial for the murder of the man found dead on the Dombrowski farm. The jury convicted Dombrowski and he was sentenced to life imprisonment. The Supreme Court of Wisconsin affirmed the jury conviction. *State v. Dombrowski*, 44 Wis. 2d 486 (1969).

I.

A majority of the Wisconsin Supreme Court[1] decided that the police action which discovered the incriminatory evidence in the Ford was not a search, but an inspection, under the doctrine of *Harris v. United States*, 390 U.S. 234 (1968).

This habeas proceeding followed. Dombrowski alleged, *inter alia*, that the search and seizure were unreasonable and violated his Fourth Amendment right. The district court, in denying Dombrowski habeas relief, followed the Wisconsin Supreme Court's opinion and held that the "inspection" was reasonable and not violative of Dombrowski's Fourth Amendment right.[2] It is conceded here by the State that the "inspection" was a search.

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[1]"A minority of this court, including the writer of this opinion, concludes that the seizure here was a search. . . . The minority would conclude that the search was unreasonable for the same reason that the search was declared illegal in *Preston v. United States.*" *State v. Dombrowski*, 44 Wis. 2d 486, 497 (1969).

[2]The court did not specifically pass upon Dombrowski's allegations that the searching of the farm and the Dodge was illegal or that the exercise of his Sixth Amendment right was interfered with. *Dombrowski v. Cady*, 319 F. Supp. 530, 533 (1970).

When the inside of the Ford was searched at the scene of the mishap, the police had no knowledge of the homicide. The search of the Ford was aimed at finding Dombrowski's service revolver. The trunk was not searched, presumably because—the revolver not being in the passenger area of the Ford—there was no danger to the arresting officers. When the deferred search was made at the Kewaskum garage, the officer knew no more than he did at the time of the original search. At the time of the second search, no further evidence was needed to sustain the charge of driving while intoxicated. The search must therefore have been for incriminating evidence of other offenses. *See United States v. Ware*, No. 71-1380 (7th Cir. March 29, 1972) (dissenting opinion). We are not persuaded that protection was needed, since the revolver was, if any place, in the locked trunk.

There was no basis upon which the police could reasonably decide that they were in danger, or that the Ford was a "fleeting target" which posed danger to evidence, or which might be driven out of the jurisdiction so as to invoke the exception to the Fourth Amendment warrant clause enunciated in *Carroll v. United States*, 267 U.S. 132 (1925). The Ford, immobilized by the accident, was locked by the police at the Kewaskum private garage in the early morning when searched. The police had no inkling that there was evidence in the Ford of any offense by Dombrowski other than the drunken driving of which the police knew. And it seems highly unlikely that in the small town of Kewaskum there was danger of anyone going to the garage, getting into the Ford, and driving it away. *Cf. United States v. Castaldi*, 453 F. 2d 506 (7th Cir. 1971). When the police searched the Ford at the scene of the accident they had probable cause to arrest Dombrowski for driving while intoxicated. They had no justification to search except to look for the

gun in the interest of safety. There was no justification therefore under *Chambers v. Maroney*, 399 U.S. 42 (1970),[3] for the warrantless deferred search.

Under *Coolidge v. New Hampshire*, 403 U.S. 443 (1971), warrantless searches are per se unreasonable. There are but few exceptions, and to come within one of them it must be shown that the "exigencies of the situation" rendered the warrantless search imperative. *Coolidge* at 454-455. There is no showing in the record here of any exigency justifying the deferred search of the Ford.

We think the deferred search was unreasonable under the Supreme Court's holding in *Preston v. United States*, 376 U.S. 364 (1964). In *Preston*, acting upon a telephone complaint that "three suspicious men were acting suspiciously," police found Preston and two other men sitting in a parked car in a business district. *Preston* at 365. Under questioning the men gave evasive answers, stated they were unemployed, and had among them only twenty-five cents. The men were arrested for vagrancy and taken to the police station. The car was taken by police to a garage. After the men were booked for vagrancy, police went to the garage and a warrantless search of the car produced two loaded guns from the glove compartment and

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[3]In *Chambers*, almost immediately after an armed robbery of a gas station, police were told a blue compact station wagon was used by the four robbers, one of whom wore a green sweater and another a trench coat. Within an hour a blue compact station wagon carrying four men was stopped two miles from the gas station. Chambers was one of the four men and was wearing a green sweater, and a trench coat was in the car. The occupants were arrested, the car was driven to the police station and there searched without a warrant. The Court held a warrant unnecessary, since the police had probable cause to search the car without a warrant on the highway—because of the exigent circumstances—and the probable cause factor carried over to the station and the search there was reasonable.

various incriminating items from the trunk. The warrantless searches "at another time and place" were held unreasonable since the men were under arrest and were no danger to the officers, could not have destroyed the evidence of the "crime" of vagrancy, or could not have removed the car from the jurisdiction. *Preston* at 368.

Here the bloodied towel, piece of floor mat, night stick, and officer's uniform pants seized in the deferred search substantially contributed to Dombrowski's conviction of murder. The towel and piece of floor mat were matched at the trial with evidence seized in a subsequent search of Dombrowski's Dodge on the farm the morning of September 13. The trial was therefore tainted by the use of the bloody towel and piece of mat, seized in the unresonable warrantless search of the Ford. We hold that the trial court committed error of constitutional dimension in denying Dombrowski's motion to suppress the items seized in the Ford and admitting them into evidence at the murder trial over his objection.

II.

Should Dombrowski be tried again it is likely that Wisconsin will intend to use evidence gathered in the searches of the farm and the Dodge. The reason is that the Wisconsin Supreme Court has decided the searches of the farm and Dombrowski's Dodge on September 12 and 13 were not illegal[4] and that no constitutional error was committed in admitting the products of the searches into evidence. Assuming the case is retried, the trial court would be bound by that decision and corresponding rulings would likely be made upon Dombrowski's objections. We are not bound by the Wisconsin Supreme Court

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[4]*Dombrowski v. State*, 44 Wis. 2d at 498-499.

decision, however. *See Townsend v. Sain*, 372 U.S. 293, 312 (1963). We deem it prudent to preclude, if we can, serious error at a second state trial. We conclude therefore that we should consider Dombrowski's constitutional challenges of the September 12 and 13 searches of the Dodge.

The five hour warrantless search of the farm on September 12 began about 3:00 p.m. The sheriff's police before entering the farm had possession of the items seized in the search of the Ford in Kewaskum and had received the subsequent information from Dombrowski's attorney that a body could be found at the farm. It is clear that police may not use evidence previously seized in an illegal search to justify probable cause for a subsequent arrest. Such a bootstrap practice would be abhorrent to our constitutional search and seizure principles. The validity of the warrantless search accordingly must be based upon the information given by the attorney.

We see no reason for denying to the hearsay statement of the attorney the reliability given to hearsay information exchanged between law enforcement officers. The courts have found information from one policeman to another sufficiently reliable for issuance of a warrant. *United States v. Ventresca*, 380 U.S. 102 (1965); *accord, Aguilar v. Texas*, 378 U.S. 108 (1964). The officers accordingly could well give credence to what Dombrowski's attorney told them. And we think that police proceeding forthwith onto the farm, without a warrant, to find the body was prudent police work. The person might not be dead and might die if not rescued. We think that to require the police to have delayed the search until a warrant was obtained would be unreasonable under these circumstances.

This court's decision in *United States v. Hull*, 441 F.2d 308, 313 (7th Cir. 1971), does not preclude our conclusion. The court there decided that a defendant's Fifth Amendment right against self-incrimination cannot be balanced against police officers' "sincere attempts" to rescue a missing undercover agent, since involuntary incriminating statements "can be no less compelled in one type of case than another." The reason is that no balancing is needed to determine that an involuntary self-incriminating statement violates the Fifth Amendment, *i.e.*, a good end does not justify unlawful means. However, in search and seizure cases, assuming a good end, such as protecting the body if alive, the question is whether the means—the search and seizure—are lawful. Whether the means are lawful, however, requires balancing of circumstances, *e.g.*, do the circumstances on balance show probable cause, fleeting target, incident to arrest. We hold that entry of the farm without warrant was lawful and the search of the farm for the body was reasonable. The lawful farm search produced the body. Neither do we see an unreasonable widening of the legal search in seizing the white sock in plain view nearby.

After the body and sock were found, the police officer peered into the Dodge and observed the blood soaked back seat and briefcase. On the basis of what was found and observed, the police at about 8:00 p.m. obtained a warrant to search the Dodge. The warrant was executed and the return of the warrant listed the items seized. The incriminating piece of mat and the bloodied white sock were not listed in the return and presumably had not been seen the night before.

The next morning, September 13, Mauer, a crime laboratory specialist,[5] searched the Dodge and "[took] up" the piece of the floor mat and a bloody sock, and labeled them. *Dombrowski* at 498. He acted under "authority" of the warrant issued the previous night. The Wisconsin trial court denied Dombrowski's motion to suppress these two items and later admitted them into evidence over objection. The bloodied piece of mat was matched at the trial with the piece seized in the illegal search of the Ford, and the bloody sock matched with the sock seized near the body on the farm.

Dombrowski challenges these searches as violative of his Fourth Amendment right, and the use of the evidence seized as constitutional error.

The Dodge had been placed on the farm where Dombrowski could legitimately place it, the search was directed at his Dodge and, by indirection, at him. He has standing therefore to challenge the legality of the search. *See Jones v. United States*, 362 U.S. 257, 267 (1960).

The question with respect to the search[6] of the Dodge the night of September 12 requires a determination whether the product of the police officer's observation of the inside of the Dodge was unlawful under the "plain view" doctrine. The plain view doctrine applies only where the discovery was "inadvertent. . . . But where the discovery is anticipated, where the police know in advance the location of the evidence and intend to seize it, the situation is altogether different."

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[5]Crime Laboratory Division of the Wisconsin Department of Justice.

[6]We need not decide whether the attorney's statement to the police and the testimony of Officer Howard in obtaining the search warrant were fruit of the unlawful search of the Ford. The police were lawfully on the farm and the plain view doctrine justifies the seizure of the items that were observed by Howard in the Dodge.

Coolidge at 469-470.[7] We cannot read the record before us to give any indication that the police officer who peered into the Dodge had no right to be where he was when he observed what was in the car (*cf. Harris* at 236), or that he knew at the time there was evidence in the Dodge and intended to seize it. *Coolidge* at 470. Consequently we read the record as showing that the observation was "inadvertent" and what was seen could be properly used to justify the search. Our conclusion is that the back seat and briefcase were properly seized in a lawful search.

The Wisconsin Supreme Court decided that the bloodied piece of mat and white sock seized by Mauer, the crime laboratory specialist, were "in plain view and subject to seizure without a warrant." *Dombrowski* at 499. We disagree. We assume that Mauer was rightfully at the scene. But it is clear that his discovery was not "inadvertent." He was searching for further evidence concerning the homicide. Accordingly, the plain view doctrine does not justify his warrantless search and seizure.

The Wisconsin court justified Mauer's taking the bloodied items as authorized under the warrant issued the previous night. We have expressly refrained from deciding whether that warrant was valid. See footnote 6. Assuming arguendo, however, that the warrant was validly issued, the objects described in the warrant were the bloodied back seat and the briefcase. The police did not observe, use in the application for the warrant, list in the return, or seize, that night, the bloodied sock and piece of mat. These two items were seized by Mauer the next day.

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[7] See also, *The Supreme Court 1970 Term*, 85 HARV. L. REV. 243-250 (1971).

There was no continuing authority under the warrant issued the previous night. First, these items were not described in the warrant and presumably were not observed that night. Second, when the warrant was returned—before Mauer came on the scene—it was *functus officio.* A "new ball game," so to speak, began when Mauer made his "inspection."

Having found that Mauer unlawfully seized the bloodied sock and piece of mat, we conclude that their admission into evidence was constitutional error. The conviction is void.

We reverse the district court judgment dismissing the petition for the writ and remand with direction to grant the relief prayed for in the petition unless the Wisconsin authorities grant Dombrowski a new trial within a reasonable period to be set by the district court.

REVERSED AND REMANDED.

KNOCH, *Senior Circuit Judge.* (dissenting) The trial judge who saw and heard the witnesses credited their testimony that the local police officers did believe that all Chicago policemen carried sidearms. Granted this belief, it was only reasonable to look for the apparently missing sidearm. It would be unreasonable to rely on information from the petitioner whose state had so impressed them that they sought a sobriety test for him. The original cursory check of the glove compartment and back seat was hardly sufficient. It would be careless to leave a firearm in the trunk of an automobile in a public garage, even in the small town of Kewaskum where the majority believes there was little chance of anyone's improperly getting possession of the automobile. If the firearm had been there, had been improperly secured by some unauthorized person and used to injure a citizen, then the police would have been remiss in their performance of duty and morally responsible for whatever happened as a

result. Despite the concession of the respondent, I find more persuasive the conclusion of the majority of the Wisconsin Supreme Court that this check of the automobile was not a search, but an inspection. I would affirm the conviction.

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit.

USCA 3921—The Scheffer Press, Inc., Chicago, Illinois—6-2-72—200

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

July 24, 1972

Before

Hon. WIN G. KNOCH, Sr. Circuit Judge

Hon. ROGER J. KILEY, Circuit Judge

Hon. THOMAS E. FAIRCHILD, Circuit Judge

CHESTER J. DOMBROWSKI,
Petitioner-Appellant,

No. 71-1094 vs.

ELMER CADY, Warden,
Respondent-Appellee.

Appeal from the United States District Court for the Eastern District of Wisconsin, (70 C 129)

On consideration of the petition for rehearing and suggestion that it be heard en banc filed in the above-entitled cause, no judge in active service having requested a vote thereon, and a majority of the members of the panel having voted to deny a rehearing,

IT IS ORDERED that the petition for a rehearing in the above-entitled cause be and the same is hereby denied.

MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. 72-586

ELMER O. CADY, WARDEN,
Petitioner,

-v.-

CHESTER J. DOMBROWSKI,
Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF FOR PETITIONER

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January 23, 1973

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IN THE

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OCTOBER TERM, 1972

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ELMER O. CADY, WARDEN,

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ON WRIT OF CERTIORARI TO THE
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BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the Court of Appeals is reported as *Dombrowski v. Cady* (7th Cir., 1972), 11 Cr. L. 2289, and is printed in the appendix to the petition. The opinion of the District Court is reported as *Dombrowski v. Cady* (E.D. Wis., 1970), 319 F. Supp. 530 (A. 22).

JURISDICTION

The judgment of the Court of Appeals for the Seventh Circuit was entered on June 2, 1972. A timely petition for

rehearing en banc was denied on July 24, 1972. Petition for certiorari was filed October 11, 1972, and certiorari was granted December 11, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. §1254 (1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Fourth Amendment to the United States Constitution:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Rule 52 (a) of the Federal Rules of Civil Procedure:

> In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41 (b).

QUESTIONS PRESENTED

1. Is a police officer engaged in a "search" within the meaning of the Fourth Amendment when, seeking to locate property of a person under arrest for drunk driving, he opens the trunk of the person's disabled vehicle and discovers what later develops to be evidence of a murder of which he had no previous knowledge or suspicion?

The Court of Appeals held in the affirmative.

2. If the first question is answered in the affirmative, is such a search "unreasonable" within the meaning of the Fourth Amendment?

The Court of Appeals held in the affirmative.

3. Where a judge issues a written order for the search and an oral order for impounding of a vehicle for evidence of the crime of murder and the vehicle is thereafter seized and removed to a police garage, is evidence obtained in the search the following day admitted at trial in violation of Fourth Amendment rights?

The Court of Appeals held in the affirmative.

4. Does the "exclusionary rule" serve society's needs?

Not considered by the Court of Appeals.

STATEMENT OF THE CASE

The respondent was convicted by a jury on July 18, 1968, of first-degree murder and was sentenced to life imprisonment. The Wisconsin Supreme Court affirmed the jury conviction, *State v. Dombrowski* (1969), 44 Wis. 2d 486, 171 N.W. 2d 349.

This habeas corpus proceeding followed and the District Court denied the writ following the Wisconsin Supreme Court's opinion holding that Dombrowski's Fourth Amendment rights were not violated.

Appeal was taken to the United States Court of Appeals for the Seventh Circuit and on June 2, 1972, that court ruled that the respondent's Fourth Amendment rights were violated in the obtaining of evidence introduced at his trial. Rehearing was denied by a divided court, with Senior Circuit Judge Knock voting to grant a rehearing.

At about 10:30 p.m. on September 11, 1967, the respondent, a Chicago police officer off duty, was involved in a one-car automobile accident in which the vehicle, a leased 1967 Ford Thunderbird, was rendered inoperative north of Kewaskum, Wisconsin. After being arrested for drunk driving Dombrowski pleaded for consideration because of his police officer status. (A. 83).

At about 2:00 a.m. on September 12, 1967, the respondent was examined in St. Joseph's Hospital at West Bend, Wisconsin, where he had been taken because of injuries, intoxication, and incoherency. Shortly thereafter, William Weiss of the Washington County, Wisconsin, Sheriff's Department returned to the Ford Thunderbird, which had been towed and parked outside of Honeck's Garage in Kewaskum (A. 71), in an attempt to locate respondent's service revolver which he

understood Chicago police officers were required to carry with them at all times. (A. 86, 110).

When Officer Weiss returned to the unattended vehicle he inspected the inside and found a book of rules and regulations of the Chicago Police Department but no gun. Then, still looking for the service revolver, Officer Weiss opened the trunk of the car. There he discovered a number of blood-covered items, including a pair of uniform pants, a pair of grey trousers, a policeman's nightstick with the name Dombrowski stamped on it, a uniform raincoat, a car-floor tarp or mat, a pail and towel, and numerous other items. The blood on some of these items was dry, but on others, particularly the car-floor mat, was still wet. (A. 97).

While still under arrest for drunken driving, the respondent was questioned concerning the blood-covered items recovered from his vehicle. He asked to confer with an attorney and subsequently the attorney, under the respondent's directions, informed the Washington County District Attorney that there was a body lying near the family picnic area at the north end of his brother's farm. Shortly thereafter the dead body of a white male was found lying in a dump area of the farm. A single white sock was found near the body.

Subsequently, one of the investigating officers looked through the windows of a Dodge automobile parked in the farmyard a few hundred yards from the body. He saw a blood-covered briefcase on its floor. The back seat of the car and the back of the front seat of the car were also splattered or covered with blood. (A. 143). Armed with the information concerning the blood-covered items discovered in the Thunderbird, the discovery of the body, and the observations of the blood in various areas of the Dodge automobile, the district attorney and the sheriff applied to the county judge of Fond du Lac County for the issuance of a search warrant to search the Thunderbird and the Dodge for further

evidence of murder. The judge issued the warrants to search the vehicles and an order was made during the proceedings directing the sheriff to impound both vehicles. (A. 44). Shortly after the warrants were issued at 8:15 p.m. on September 12, 1967, a cursory examination of the Dodge vehicle was made at the scene and the vehicle was then towed to the sheriff's garage at Fond du Lac where it was marked as Exhibit #40 at the trial and still is being held as evidence. (A. 124).

The following morning, September 13, 1967, experts Cleon Mauer and Kenneth Sundberg from the State Crime Laboratory, who had been called in by the sheriff, assisted sheriff's officials in searching the inside of the Dodge vehicle for bloodied items constituting evidence of murder. (A. 158). On that date, the experts from the Crime Laboratory took into their possession, at the request of the sheriff for laboratory examination, all of the bloodied contents of the Dodge vehicle, including the back seat, front seat, backrest of back seat, a white sock, a portion of the floor mat in the rear, an attache case, and front floor mat, all of which were taken to the Crime Laboratory for clinical tests and later returned to the sheriff.

Although a partial, inaccurate, written return was prepared in regard to both search warrants on September 13, 1967, those returns were not filed with the Court until September 14, 1967 (A. 33, 36), at which time the county judge took testimony concerning the execution of both search warrants (A. 49).

All of the bloodied items found in the search of the Dodge, as well as the items found in the trunk of the Thunderbird, were introduced and accepted as evidence at the trial.

After the Wisconsin Supreme Court affirmed the conviction, the respondent filed the present action in the District Court for the Eastern District of Wisconsin on March 10, 1970. (A. 7).

On April 10, 1970, following a conference, the Court entered an order directing that if Dombrowski wanted an evidentiary hearing the Court should be notified by April 17, 1970, and any such hearing would be limited to proof relating to the allegations of paragraph 10 (c) of the petition. The order further provided that the entire state court record, including briefs filed in the Wisconsin Supreme Court and the records relating to pretrial requests for a writ of prohibition, would be filed by the State. (A. 21).

On June 5, 1970, a stipulation was entered into between the parties that five exhibits would constitute the entire state court record for determination of the habeas corpus action. These exhibits, presently on file with this Court, are designated as:

Exhibit A - which is a part of the state trial court record, including the indictment, warrant, search warrants, transcripts of returns to search warrants, receipts for vehicles, pretrial motions, decisions and orders on pretrial motions, memorandum decision on motions after verdict, and notice of appeal to the Wisconsin Supreme Court, consisting in all of 71 pages;

Exhibit B - consisting of appellant's brief, respondent's brief, reply brief of appellant, and appellant's brief in support of motion for rehearing, all filed with the Wisconsin Supreme Court;

Exhibit C - the murder trial transcript consisting of 726 pages;

Exhibit D - papers concerning an action in the Supreme Court of Wisconsin whereby an attempt was made to get a writ of prohibition to prevent the county court from requiring one of Dombrowski's attorneys to testify at the grand jury; and

Exhibit E - consisting of the briefs of counsel and court order in the prohibition action referred to in Exhibit D.

Neither Exhibit D nor Exhibit E is relevant to the issues being considered in this review.

The other portions of the record filed with the Court include 23 documents involved in the District Court proceedings and four documents from the United States Court of Appeals for the Seventh Circuit. The record is not paged consecutively.

In its decision and order of December 2, 1970, the District Court made the following findings:

1. The examination of the Thunderbird at the garage was not a search in the *Preston* sense, but rather an inspection designed to locate an article of value to be protected by those responsible for its custody. (A. 26-27).

2. Since this was not a search for incriminating evidence it was constitutionally permissible. (A. 27).

3. There was no suspicion on the part of the officers of any other misconduct by the defendant. The deputy was interested only in protecting the property of Dombrowski. (A. 27).

4. In seeking to locate the service revolver, the deputy came upon blood-splattered articles which he could not be expected to ignore. (A. 27).

The District Court also found that none of the other various grounds advanced by the petitioner reached such constitutional proportions to warrant granting of the writ. (A. 27). This finding included paragraph 11 (e) of the petition for the writ of habeas corpus which alleged that Mr. Cleon Mauer of the State Crime Laboratory conducted a search of the Dodge automobile on September 13, 1967, without a search warrant. (A. 14).

By stipulation between the parties the appeal record filed with the United States Court of Appeals for the Seventh Circuit did not include Exhibits A, B, C, D and E of the record unless the Appeals Court ordered or any party requested transmittal. (A. 28). Therefore, the record in the Appeals Court consisted of the first 14 documents filed herein by the District Court, made up mainly of the pleadings in the case, a copy of the Wisconsin Supreme Court decision, and the decision and order of the District Court.

The District Court record of proceedings filed herein does not indicate that any subsequent request for the remaining portions of the record to be sent to the Court of Appeals was made by either party or the court itself after the stipulation of the parties concerning retention of portions of the record by the District Court on January 20, 1971, and the forwarding of the record to the Appeals Court on February 1, 1971.

The Court of Appeals held that the actions of Officer Weiss constituted an unconstitutional search of the Thunderbird automobile for incriminating evidence of offenses other than drunk driving. It also held that the recovery of the bloodied

floor mat and bloodied sock from the Dodge automobile was the result of an unconstitutional search after the search warrant had been returned and became *functus officio*.

SUMMARY OF ARGUMENT

The United States Court of Appeals for the Seventh Circuit had no basis for changing the findings of the District Court because there was no evidence before the Appeals Court on which they could conclude that the findings of the District Court which were concurrent with the state trial court's findings were "clearly erroneous" within the meaning of Rule 52 (a) of the Federal Rules of Civil Procedure.

The court below erred in applying the standards of *Preston* to the inspection of the Thunderbird, since there was prior justification and inadvertence in this case.

The court below erred in concluding that the search warrant for the Dodge was *functus officio* when Mauer, the Crime Laboratory specialist, took up the piece of floor mat and bloody sock on September 13, 1967, and, regardless, the Dodge vehicle itself was evidence which had been impounded by authority of the court and, even without that authority, the investigating officers could have seized the vehicle as evidence without a search warrant.

The application of the exclusionary rule to prevent the use of the evidence discovered in the Thunderbird and Dodge automobiles in this case would result only in the murderer going free. The supposed benefit to society by teaching Officer Weiss and Undersheriff Howard, and thousands of other officers throughout the country, how to conduct proper searches is completely illusory.

ARGUMENT

I. The Findings And Conclusions Of The Court Below That Weiss Was Searching The Thunderbird For Incriminating Evidence Of Other Offenses And That Mauer "Took Up" The Piece of Bloodied Mat And White Sock From The Dodge After The Search Warrant Was *Functus Officio* Are Not Supported By The Record.

A. Officer Weiss was not searching for incriminating evidence of other crimes.

Apparently the findings of the Appeals Court were based on the pleadings and briefs and arguments of counsel primarily. With this limited access to the factual record, the Appeal Court changed the District Court findings and conclusions concerning the "searches" of the Thunderbird and the Dodge.

In referring to Officer Weiss's discovery of the bloodied materials in the Thunderbird, the court concluded that

> "The search must therefore have been for incriminating evidence of other offenses." (Petition A. 104).

To reach such conclusion the court changed the findings of the District Court that Officer Weiss was motivated solely by the desire to locate the revolver he thought was in the Thunderbird. The only evidence in the record relating to Officer Weiss's motivation is his testimony. It was not shaken on cross-examination and no other evidence was produced at the hearing on motions to suppress, at the trial or voir dire examination, at the hearing on motions after verdict, or at the District Court trial to change the record regarding his motivation.

It is interesting to examine the State and District Court findings filed with this Court and compare them with new findings of the court below in regard to the so-called search of the Thunderbird. A pretrial motion was made by Dombrowski to the County Court of Fond du Lac County concerning the suppression of the evidence taken from, among other places, his automobiles. In his decision and order on the motion to suppress filed with the Court on June 18, 1968, the county judge found in part as follows (A. 57-58):

> "* * * The defendant has failed to meet this burden of proof in regard to the alleged search by the Washington County authorities; he called no witness in regard thereto nor any of the Washington County authorities that may have participated in the alleged original search of the Thunderbird, which facts and circumstances, so far as the record now stands, indicates that the original search of the Thunderbird was a routine police procedure, when they were charged with the responsibility of safekeeping of the defendant's property pending his release and return of his property to him.
>
> "There is nothing in the record to indicate that the Washington County authorities knew anything of any alleged murder at the time they went to search the Thunderbird and the defendant's personal articles, if any, at which time the defendant was under arrest and charged with operating an automobile while intoxicated and was in a West Bend hospital.
>
> "It would appear to the Court that the record so far as any articles taken from the Thunderbird by the Washington County authorities as a result of a custody search of the same after it was towed off the highway in a

damaged condition, pursuant to police order, was nothing more than good routine police work to protect the personal property of Chester J. Dombrowski."

At trial, Officer Weiss testified that Dombrowski continually told him that he was a Chicago policeman. Weiss described him as being in a drunken state (A. 83) and that he was incoherent at times (A. 83).

Weiss also testified that while Dombrowski was being examined by the doctor at the hospital "* * * his left leg started to shake heavily; he tipped his head back, and when the doctor asked him a question, he pointed to his mouth with his right hand and made noises; he did not answer any questions, and he continued to shake and make noises out of his mouth." (A. 84). Weiss left the hospital and drove to Honeck's Garage, where the Thunderbird was parked outside of the garage (A. 71, 72), because it had been established that Dombrowski was a member of the Chicago Police Department, in an attempt to find his service revolver (A. 86).

At trial a voir dire examination outside of the presence of the jury was asked for by the defendant and granted by the Court. During this voir dire examination it was established that there was no sheriff's official guarding the Thunderbird (A. 91), which at that time was parked outside of the garage (A. 71), that Officer Weiss was looking for Dombrowski's service revolver and that this was standard procedure in his department (A. 73, 91). The Court then ruled that nothing had been produced in the voir dire examination which would vary the Court's previous determination on Dombrowski's motion to suppress evidence (A. 87, 93).

The issue concerning whether Officer Weiss's actions in discovering the evidence in the trunk of the Thunderbird

violated Dombrowski's Fourth Amendment rights was litigated again in motions after verdict. In his memorandum decision filed August 1, 1968, the county judge made the following findings:

> "There appears to be no question but that the arrest of Dombrowski by the Washington County Police for operating an automobile while under the influence of intoxicating liquor was a bona fide arrest; that the defendant, Dombrowski, at that time was under police custody and in no position to look after the welfare of his property that had been involved in the accident, namely the Thunderbird and other personal items that he may or may not have had in said vehicle. The Washington County Police believed that a metropolitan policeman off duty carries a revolver, and they did look in the Thunderbird for the revolver. However, there was no evidence of this being an exploratory search by the officer for any reason other than to secure items of a personal nature that may have been in the wrecked automobile, and parked outside at this time, for the general benefit of the defendant, Dombrowski. It is significant at this point that when Officer Weiss made the search of the Thunderbird that he had no information whatsoever that the defendant, Dombrowski, was involved in any violation of the law other than the operating [of] an automobile while under the influence referred to above, and that the only motivation of Officer Weiss in searching the Thunderbird was to safeguard the defendant's property during the period of time that he may be hospitalized or in official custody and unable to look after the same himself." (A. 72).

Next, the Wisconsin Supreme Court considered the question of Officer Weiss's motivation in searching for Dombrowski's service revolver. That court concluded:

> "The majority of the court is convinced that this inspection was done within a reasonable time of the car's transfer to the Kewaskum garage, and was accomplished while the police were responsible for its protection and were in the process of protecting Dombrowski's property and were not, at that time, engaged in a search of the car looking for incriminating evidence."/1

The next court to consider Officer Weiss's motivation was the United States District Court for the Eastern District of Wisconsin. That court concluded:

> "* * *Although the line is a narrow one, I conclude that the examination of the car at the garage was not a search in the *Preston* sense, but rather it was an inspection designed to locate an article of value, to be protected by those responsible for its custody. This was not a search for incriminating evidence and is constitutionally permissible under *Harris*." (A. 26).

The evidence before the District Court included the trial transcript which established a clear factual basis for the finding. Although Dombrowski had the opportunity under the court order of April 10, 1970, to present additional evidence to support the allegations in paragraph 10 (c) of his petition for writ of habeas corpus, the record is barren of any indication that such evidence was presented. (A. 21).

The next step in this five-year odyssey of Officer Weiss's opening of the trunk of the Thunderbird takes place

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/1*State v. Dombrowski* (1969), 44 Wis. 2d 486, 496, 171 N.W. 2d 349, 355.

before the United States Court of Appeals for the Seventh Circuit in Chicago, Illinois, where on June 2, 1972, that court made a factual finding which they considered supported by the evidence in the record that Officer Weiss, in opening the trunk of the Thunderbird, was motivated by a desire to secure evidence of "* * * incriminating evidence of other offenses." Thus, the Court of Appeals made a finding on a critical fact question diametrically opposed to the finding of the trial court. It is submitted that the record clearly fails to establish that the trial court finding was "clearly erroneous" within the meaning of those words as used in Rule 52 (a) of the Federal Rules of Civil Procedure. Although this Court has indicated that it will not review findings of fact in the absence of a very obvious and exceptional showing of error,/[2] it has indicated that it will not hesitate to undertake independent examination of factual issues when constitutional claims may depend on their resolution./[3]

The findings of the District Court were concurrent with the state trial court's findings which were based upon the District Court's examination of the state trial court record, whereas the Court of Appeals did not have the benefit of the state trial court record, Appeal Exhibit C, but despite this handicap proceeded to reweigh the evidence and findings concerning the credibility of the testimony of Officer Weiss and have ended up with "clearly erroneous" findings. The courts of appeal should not reweigh the evidence and findings

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/[2]*Graver Tank and Mfg. Co. v. Linde Air Prod. Co.* (1948), 336 U.S. 271, 69 S.Ct. 535, 93 L.Ed. 672.

/[3]*Berenyi v. District Director, Immigration and Naturalization Service* (1967), 385 U.S. 630, 87 S.Ct. 666, 17 L.Ed. 2d 656; *Napue v. People of State of Illinois* (1959), 360 U.S. 264, 271-272, 79 S.Ct. 1173, 1178-1179, 3 L.Ed. 2d 1217; *Fiske v. State of Kansas* (1927), 274 U.S. 380, 385-386, 47 S.Ct. 655, 656-657, 71 L.Ed. 1108. Cf. *Hoffa v. United States* (1966), 385 U.S. 293, 87 S.Ct. 408, 17 L.Ed. 2d 374.

concerning credibility. *United States v. Iacullo* (7th Cir., 1955), 226 F. 2d 788, 795, cert. den. 350 U.S. 966, 76 S.Ct. 435, 100 L.Ed. 839.

Accordingly, this court should make an independent examination of the factual issue concerning Officer Weiss's motivation for opening the trunk of the Thunderbird. It is submitted that a very obvious and exceptional showing of error is made in this record which should be corrected by reinstating the District Court finding.

B. The search warrant for the Dodge was not functus officio when Mauer "took up" the mat and sock.

The court below seems to be confused as to the sequence of events which led up to Mauer, the Crime Laboratory specialist, taking up the piece of floor mat and the bloody sock in the Dodge and labeling them on September 13, 1967. The court concluded:

> "There was no continuing authority under the warrant issued the previous night. First, these items were not described in the warrant and presumably were not observed that night. Second, when the warrant was returned—before Mauer came on the scene—it was *functus officio.* A 'new ball game,' so to speak, began when Mauer made his 'inspection.' " (Petition A. 111).

The error in that paragraph, which is obvious when the search warrant and the transcript of the hearing at the time of the return are examined (neither of which were available to the Court of Appeals because they were in Exhibit A which was retained in the District Court file), is that the search warrant was not returned until September 14, 1967, a full day after Mauer recovered the evidence while assisting

the sheriff in removing from the Dodge automobile all of the bloodied contents, including the bloodied back seat and attache case originally seen by Undersheriff Howard (A. 161, 153), but also including the front seat (A. 161), backrest of the back seat (A. 161), a white sock (A. 154), a portion of the floor mat in the rear (A. 153), and front floor mat (A. 154), all of which were taken to the Crime Laboratory for clinical tests (A. 51) and later were marked as evidence at the trial.

The portion of the original trial record on file with this Court, marked Exhibit A, includes a copy of the search warrant for the 1960 Dodge and the return of the officer. Both are marked with a filing stamp of the Court dated September 14, 1967. (A. 31, 33). The transcript of the hearing on the return of the search warrant to the court is also a part of Exhibit A and clearly shows that the proceedings on the return were held on the 14th day of September, 1967. Since the warrant was issued on September 12, 1967, and the court ordered the return to be made in 48 hours, the return date on the 14th was well within the limit set by the Court.

Although it might be said that the return is incomplete and that even the transcript of the hearing on the return does not mention all of the contents of the Dodge which were taken to the Crime Laboratory for examination, those questions are not before the Court and do not reach constitutional proportions. *Mills v. Maryland* (1971), 12 Md. App. 449, 279 A. 2d 473, cert. den. 406 U.S. 967, 92 S.Ct. 2411, 32 L.Ed. 2d 666; *United States v. Moore* (6th Cir. 1971), 452 F. 2d 569, cert. den. — U.S. —, 92 S.Ct. 2435, 32 L.Ed. 2d 684.

In the *Moore* case it was contended that evidence not listed in the return to the search warrant was admitted at trial in violation of federal constitutional rights. The Court

of Appeals refused to so hold, citing *Rose v. United States* (6th Cir., 1921), 274 F. 245, 250-251, cert. den. 257 U.S. 655, 42 S.Ct. 97, 66 L.Ed. 419. The Court reasoned that defense counsel had adequate opportunity to cross-examine witnesses during trial to establish how the evidence in question was obtained and whether any constitutional rights were violated.

The factual findings and conclusions of the District Court were well supported by evidence in the record in regard to the evidence obtained from the Dodge automobile by the Sheriff of Fond du Lac County and his agents. In reviewing the District Court findings, the Court of Appeals responsibility is not to substitute findings it could have made had it been the fact-finding tribunal but its sole function is to review the record to determine whether findings of the District Court were clearly erroneous. *Speyer, Inc. v. Humble Oil and Refining Co.* (3rd Cir., 1968), 403 F. 2d 766, cert. den. 394 U.S. 1015, 89 S.Ct. 1634, 23 L.Ed. 2d 41. It is not the function of the Court of Appeals to reevaluate evidence presented below and the Court cannot substitute its judgment for the firsthand evaluation made by the trier of fact. *Cataphote Corp. v. De Soto Chemical Coatings, Inc.* (9th Cir., 1966), 356 F. 2d 24, cert. den. 385 U.S. 832, 87 S.Ct. 71, 17 L.Ed. 2d 67.

It is true that in *Guzick v. Drebus* (6th Cir., 1970), 431 F. 2d 594, the Court held that when dealing with questions of constitutional magnitude the Court of Appeals is not at liberty to accept the fact-trier's findings merely because it considers them not "clearly erroneous" and this Court denied certiorari, 401 U.S. 948, 91 S.Ct. 941, 28 L.Ed. 2d 231. However, in that case, the Court of Appeals made its own examination of the material from which the decision was

made. In this case, the Court of Appeals entered findings inconsistent with the District Court findings without examining the factual record upon which the District Court findings were made.

Accordingly, this Court should reinstate the findings of the District Court, since there has been no showing that those findings were clearly erroneous.

II. Officer Weiss Did Not Conduct A "Search" Of The Thunderbird Within The Meaning Of The Fourth Amendment.

Assuming that this Court agrees that the findings of the District Court should be restored in regard to Officer Weiss's motivation, then it must be concluded that his actions in seeking to recover the property of Officer Dombrowski did not constitute a search within the meaning of the Fourth Amendment.

> "A search implies an examination of one's premises or person with a view to the discovery of contraband or evidence of guilt to be used in prosecution of a criminal action. The term implies exploratory investigation or quest. * * *" *Haerr v. United States* (5th Cir., 1957), 240 F. 2d 533, 535.

Law enforcement officers in our society perform a number of functions, only one of which is the investigation of criminal activity and the securing of evidence to be used in criminal prosecutions. Many responsibilities relate to public health and safety not directly related to the ferreting out of crime. Their primary responsibility actually is the guarding of the lives and the property of citizens of their

community. This includes, of course, the securing of the property of one who is in their custody and the safekeeping of that property. When such nonaccusatory functions are being carried out and there is no suspicion of criminal activity, the official functions do not constitute a search within the meaning of the Fourth Amendment. That amendment provides protection only against "searches and seizures" that are "unreasonable." Police discovery of evidence obtained by means other than a "search" is not affected by the Fourth Amendment and the evidence may be seized. *Frazier v. Cupp* (1969), 394 U.S. 731, 89 S.Ct. 1420, 22 L.Ed. 2d 684.

Any careful survey of the case law relevant to this appeal convinces one that "reasonableness" is an elusive concept sometimes distinguished and confused behind language relating to the intensity of the search, the belief that a crime has or has not been committed, the location of the search, and various other factors. The court below suggests a belief that incriminating evidence discovered in the course of a nonaccusatory "search" or "inspection" will be automatically inadmissible at trial unless the circumstances leading to the discovery can somehow be fit into one of several acceptable "criminal" contexts. Thus, the Court enumerated the pigeonholes which this case would not fit into, such as "* * * no basis upon which the police could reasonably decide that they were in danger, or that the Ford was a 'fleeting target' which posed danger to evidence, or which might be driven out of the jurisdiction so as to invoke the exception to the Fourth Amendment warrant clause enunciated in *Carroll v. United States*, 267 U.S. 132 (1925)."

The Court further concluded that there was no justification under *Chambers v. Maroney* (1970), 399 U.S. 42, 90 S.Ct. 1975, 26 L.Ed. 2d 419, because there was no justification to search except to look for the gun in the interests of safety.

The Court went on to conclude that under *Coolidge v. New Hampshire* (1971), 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed. 2d 564, there are few exceptions to the doctrine that warrantless searches are per se unreasonable and in order to come within one of the exceptions it must be shown that the "exigencies of the situation" rendered the warrantless search imperative. The conclusion was that there was no pigeonhole into which this case could be fitted and that under *Preston v. United States* (1964), 376 U.S. 364, 84 S.Ct. 881, 11 L.Ed. 2d 777, the search of the Thunderbird was unreasonable.

Little more than passing mention was given to *Harris v. United States* (1968), 390 U.S. 234, 88 S.Ct. 992, 19 L.Ed. 2d 1067, on which the Supreme Court of Wisconsin and the District Court based their determinations that Officer Weiss's actions did not constitute a search for incriminating evidence and was constitutionally permissible.

The only conceivable reason for the Appeals Court not finding *Harris* reasonably analogous to the case at bar is that they concluded that Officer Weiss was actually searching for evidence of other crimes. If this Court restores the District Court finding, it would seem to be appropriate to find the analogy between this case and *Harris*. In both cases the evidence was discovered as a result of a measure taken to protect the property of the person in custody. In both cases the officer had a right to be in the position he was in when the objects fell in plain view.

The fact that the officer in *Harris* was operating under a specific regulation in dealing with custody procedures in connection with impounded vehicles and Officer Weiss was operating under his department's "standard procedures" to secure in a place of safety property of persons in custody

of his department, would seem to make little difference because the standard is subjective, i.e., the officer's reasons for being where he was so that he would be in a position to view the evidence which was subsequently seized.

The lower court's reliance on *Preston* is misplaced. In *Preston* the search was thought to be justified primarily on the ground that it was incidental to and part of a lawful arrest. This Court said that "* * * Once an accused is under arrest and in custody, then a search made at another place, without a warrant, is simply not incident to the arrest. * * *" 84 S.Ct. at 883. No claim was made to the lower court that the inspection of the Thunderbird was a search incident to an arrest. In *Preston* it was alternatively argued that the search was justified because the officers had probable cause to believe the car was stolen. That fact situation just does not fit the present case.

In *Harris* the Court said that the sole question for consideration was whether the officer discovered the registration card by means of an illegal search and concluded that he did not. This Court said, at 88 S.Ct. 993:

> "* * * The precise and detailed findings of the District Court, accepted by the Court of Appeals, were to the effect that the discovery of the card was not the result of a search of the car, but of a measure taken to protect the car while it was in police custody. * * *"

These precise and detailed findings were noted in the Court of Appeals decision in that case, *Harris v. United States* (D.C. Cir., 1966), 370 F. 2d 477, 478, note 3. That situation is similar to the thorough treatment given to the question of Officer Weiss's motivation by the state trial

court at a hearing on motions to suppress before trial, at the voir dire examination at trial, and again at a hearing on motions after verdict.

This Court considered this question of prior justification and inadvertence in *Coolidge*, where the Court said, at 91 S.Ct. 2038:

> "* * * Finally, the 'plain view' doctrine has been applied where a police officer is not searching for evidence against the accused, but nonetheless inadvertently comes across an incriminating object. Harris v United States, 390 US 234, 19 L Ed 2d 1067, 88 S Ct 992; Frazier v Cupp, 394 US 731, 22 L Ed 2d 684, 89 S Ct 1420; Ker v California, 374 US, at 43, 10 L Ed 2d 743. Cf. Lewis v United States, 385 US 206, 17 L Ed 2d 312, 87 S Ct 424.
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> "What the 'plain view' cases have in common is that the police officer in each of them had a prior justification for an intrusion in the course of which he came inadvertently across a piece of evidence incriminating the accused. * * *"

However, see *North v. Superior Court*, 11/16/72, 12 Cr. L. 2232, where the California Supreme Court concludes that there was no majority behind Mr. Justice Stewart's position that "inadvertence" is a necessary element of the plain-view exception.

The lower court cited language from *Coolidge* to the effect that "* * * warrantless searches are per se unreasonable." Of course, the first question to be determined is whether Officer Weiss was actually engaged in a search. If *Harris* and the "plain view" doctrine are to be applied where a police officer is not searching for evidence against the accused but nonetheless inadvertently comes across an incriminating object, then *Coolidge* is no problem.

The *Coolidge* case has not necessarily clarified the complicated status of search and seizure law. Rather, the case has emphasized the problems facing law enforcement officials and the courts in administering the law so that the interests of society and persons accused of crime are both recognized and protected.

However, *Coolidge* reaffirmed the doctrine of *Harris* that where an officer had a prior justification for an intrusion in the course of which he came inadvertently across a piece of evidence incriminating an accused, the "plain view doctrine" removed the act from the warrant requirement.

In *Harris* the Court held that the evidence was not obtained as a result of a search but as the result of a police measure taken to protect the vehicle while it was in police custody. The Court in *Harris* reasoned:

> "Once the door had lawfully been opened, the registration card, with the name of the robbery victim on it, was plainly visible. * * *" 88 S.Ct. 992 at 993.

The Court specifically declined to rule on the admissibility of evidence found as a result of a search required of an impounded vehicle by regulations of the metropolitan police department because no search under such regulation was involved.

Recently the Supreme Court of Virginia held that evidence obtained from an automobile, which was taken to the property room of the police department under department regulations where the contents of the car were removed, inventoried and stored for safekeeping, was secured as a result of efforts designed to protect the property of a citizen arrested away from home and did not violate Fourth Amendment rights. *Cabbler v. Virginia* (1971), 212 Va. 520, 184 S.E. 2d 781; this Court denied certiorari, 405 U.S. 1073, 92 S.Ct. 1501, 31 L.Ed. 2d 807.

It might be concluded that *Harris* stands on the proposition that where the initial intrusion is bottomed on police action designed to protect the property of one in custody, the Fourth Amendment does not require the police to obtain a warrant, because there was no search and, regardless, a warrant would not issue under such facts. This would seem to end the matter and not require any further justification. Instead, the Court went on to cite the "plain view" doctrine either as primary or additional justification.

It appears, therefore, that the "plain view" doctrine was the primary justification for the *Harris* result. This position is substantiated by the language from *Coolidge*, supra, referring to the "plain view" doctrine as having been applied in *Harris*. 29 L.Ed. 2d 583.

While it is the position of the petitioner that Officer Weiss had a right to be in the position to have the view to observe the evidence which he seized and, therefore, his actions would be justified under the "plain view" doctrine, his actions should more appropriately be classified as not being a search within the meaning of the Fourth Amendment and, therefore, no existing pigeonhole need be found on which to base the justification. If no search within the meaning of the Fourth Amendment, then no need to find the pigeonhole of justification. If "* * * this initial intrusion is justified * * * by an extraneous valid reason for the officer's presence," there is no unconstitutional search. Once having determined that the officer had a right to be in a position to view the evidence, seizure is not difficult to justify.

Accordingly, it is urged that the Court determine, in accordance with *Harris* and *Coolidge*, that the discovery of the bloodied materials in the trunk of the Thunderbird

was inadvertent, not the result of a search of the car but of a measure taken to protect the property of Dombrowski and that, therefore, there was no search within the meaning of the Fourth Amendment, and the objects which were in plain view of the officer were subject to seizure and subsequent introduction as evidence against Dombrowski.

It is submitted that a "search" within the meaning of the Fourth Amendment should be defined to include the following two elements:

(1) An examination of an area wherein one enjoys a reasonable expectation of privacy or freedom from governmental intrusion

(2) with an intention of discovering evidence of the commission of a violation of the law.

III. If There Was A "Search," It Was Reasonable Within The Meaning Of The Fourth Amendment.

If the Court is unable to conclude that Officer Weiss's action did not constitute a search within the meaning of the Fourth Amendment, and if the statement in *Coolidge* that "* * * plain view does not occur until a search is in progress," 91 S.Ct. 2039, is controlling, then we would urge that the "plain view" doctrine applies and the search was reasonable.

The reasonableness of an act of course must be judged by the circumstances surrounding the act. In this case, Dombrowski had repeatedly asserted his status as a Chicago police officer, he became incoherent at the hospital and could not be communicated with at the time, the damaged Thunderbird was left outside of Honeck's garage, Officer Weiss understood that Chicago police officers carry their weapons

with them at all times, Officer Weiss understood his duty under his department's "standard procedures" to be to secure in a place of safety property of persons in custody of his department, and he had no knowledge of Dombrowski being involved in a murder or any other crime except drunk driving.

In addition to *Harris*, several other cases decided by various courts of appeals have held similar conduct to be reasonable. In *Vauss v. United States* (D.C. Cir., 1966), 370 F. 2d 250, police found the defendant unconscious on the sidewalk and called an ambulance when they could not rouse him. In searching his pockets for identification to give the hospital, they found narcotics which were held admissible at trial because the search for identification was reasonable. In *United States v. Graham* (6th Cir., 1968), 391 F. 2d 439, cert. den. 393 U.S. 941, 89 S.Ct. 307, 21 L.Ed. 2d 278, it was determined that an examination of an automobile properly in police custody is not a search and that evidence of the serial number of the car obtained in the examination is not excludable. In *DiMarco v. Greene* (6th Cir., 1967), 385 F. 2d 556, the garageman having custody of an impounded car got into the driver's seat in order to move the car and noticed a gun partly concealed on the front seat. In *United States v. Blackburn* (6th Cir., 1968), 389 F. 2d 93, the police invaded the privacy of an arrestee's motel room pursuant to their usual procedure of gathering up, itemizing, and storing the effects of a transient who was arrested, and itemization of the room's contents revealed an incriminating gun and notebook; and in *Marshall v. United States* (5th Cir., 1970), 422 F. 2d 185, an officer walked up to a parked car which had been called to his attention by someone who believed that the driver might be ill, looked into the car from the outside and saw a sawed-off shotgun in plain view.

It is urged that the conduct of Officer Weiss was reasonable and, therefore, he was rightfully in a position to view the trunk of the Thunderbird and its contents. As the Court said in *Coolidge:*

> "* * * And, given the initial intrusion, the seizure of an object in plain view is consistent with the second objective, since it does not convert the search into a general or exploratory one. * * *" 91 S.Ct. 2039.

IV. The 1960 Dodge Was Impounded As Evidence Under Authority Of Search Warrant.

Not only has the Appeals Court made an erroneous finding that the search warrant for the 1960 Dodge was *functus officio* when Mauer, the Crime Laboratory specialist, removed the bloodied white sock and blook-soaked partial floor mat, but also ignored was the fact that the vehicle itself was seized and towed to the sheriff's garage where the sheriff had experts from the Crime Laboratory come in and thoroughly examine this piece of evidence so that it and its contents could be developed to the fullest possible extent in connection with an anticipated murder prosecution.

A more detailed review of the factual situation leading up to the application for the search warrant and the subsequent seizure of the vehicle seems appropriate at this time.

After the Washington County officials had seized the bloodied material from the Thunderbird trunk, including part of the floor mat from the back of a Dodge car filled with blood (A. 21), Dombrowski asked to confer with an attorney who later advised the Washington County officials that a body would be found on the Dombrowski farm. Situated on the

Dombrowski farm, a few hundred feet from where the body was found, was the Dodge vehicle owned by Dombrowski (A. 44). A search warrant was authorized by the Court for both the Thunderbird and the 1960 Dodge, and Undersheriff Raymond Howard was directed "* * * to search both vehicles and impound the same and make a report to this Court as to his findings within the next 48 hours." The Court further ordered that Howard and "* * * any of his assistants that he calls to his help are entitled to search the vehicles mentioned * * *." (A. 44).

These proceedings were held at approximately 8:02 p.m. on September 12, 1967, and by 10:00 p.m. that same date the Dodge vehicle was hauled by wrecker to the Safety Building garage in Fond du Lac where it was locked up in the garage (A. 163).

The next morning sheriff's officials and the experts from the Crime Laboratory, Mauer and Sundberg, who were called in to assist the sheriff and remove bloodied items from the Dodge, including the back seat (A. 161), front seat (A. 161), backrest of the front seat (A. 161), a section of floor mat (A. 153), a brown leather attache case (A. 153), front floor mat (A. 154), and a white sock (A. 154).

Thereafter a written, partial return to the search warrant was executed by Mr. Howard on the 13th of September, 1967, and it was filed with the Court on September 14, 1967 (A. 33). A formal, oral return was made to the search warrant on the 14th day of September, 1967, at 10:25 a.m., and Mr. Howard advised the Court under oath that the 1960 Dodge had been impounded and was in the Safety Building in Fond du Lac (A. 50). He further advised the Court that a large area of blood, covering over 12 inches in diameter, in the rear seat

had been found, there was blood on the briefcase, and blood splattered on the back of the front seat. He further advised the Court: "* * * the Sheriff has turned the briefcase and so forth over to the Wisconsin State Crime Laboratory for further investigation." (A. 51).

The Dodge vehicle remained in the custody of the sheriff until it was marked as Exhibit No. 40 at the trial (A. 124). That the automobile itself was a necessary piece of evidence becomes very obvious when we consider that it was established at trial that the murder victim bled to death in the Dodge automobile which was to be the most significant piece of evidence in establishing venue in Fond du Lac County, a necessary element of the crime of murder in the State of Wisconsin. Undersheriff Howard concluded, after seeing all of the blood-soaked items from the Dodge, that the victim had been shot in the Dodge, and there wasn't any blood out where the body was found because it was all in the Dodge (A. 147).

Clearly the whole Dodge automobile was evidence or an instrumentality of the crime in plain sight and as such was subject to seizure and impounding. *Cooper v. California* (1967), 386 U.S. 58, 87 S.Ct. 788, 17 L.Ed. 2d 730; *Warden v. Hayden* (1967), 387 U.S. 294, 87 S.Ct. 1642, 18 L.Ed. 2d 782; *Coolidge,* dissent of Mr. Justice White, 91 S.Ct. 2060.

> "* * * Under the circumstances of this case, we cannot hold unreasonable under the Fourth Amendment the examination or search of a car *validly held by officers* for use as evidence in a forfeiture proceeding." (Emphasis supplied.) *Cooper,* 87 S.Ct. 791.

However, acting cautiously and obviously not being certain as to the latest search and seizure rules, the officers went to

the county judge to obtain a search warrant for the vehicle. Undersheriff Howard conceded that sometime before 10:00 o'clock on the night of September 12, he opened the door of the Dodge and noticed that there was still wet blood on the back seat (A. 149). However, the record is silent as to what further search or examination was made that night in the darkness prior to the vehicle being towed to the sheriff's garage. It is clear, regardless, that Mauer recovered the two pieces of evidence which the Appeals Court found contaminated, the sock and the portion of the floor mat, the following morning, September 13, while the vehicle was in the sheriff's garage.

It is not clear in the record how the Appeals Court arrived at the conclusion that the search and seizure had been completed the night of the 12th, the search warrant returned before 8:00 o'clock the morning of the 13th, and Mauer, who was assisting the sheriff, had conducted an illegal search when the warrant had become *functus officio.*

It would seem that in the situation at hand the officers would have been justified in seizing the Dodge automobile as evidence or an instrumentality of the crime without the necessity to wait until the judge had heard their evidence of probable cause and authorized the search and seizure, as Mr. Justice White said in his dissenting opinion in *Coolidge,* 91 S.Ct. 2061:

> "* * * I had not thought a search warrant was required for officers to make a seizure, see United States v. Lee, 274 U.S. 559, 47 S.Ct. 746, 71 L.Ed. 1202 (1927) (boat seized on public waters); Hester v. United States, 265 U.S. 57, 44 S.Ct. 445, 68 L.Ed. 898 (1924) (liquor seized in open field); any more than a warrant is needed to seize an automobile which is itself evidence of crime and which is found on a public street or in a parking lot. See Cooper v. California, *supra.*"

But here we do not have a warrantless search and seizure. Here we have a vehicle which was seized and searched in accordance with the authority given to the law enforcement officers by the court. Since the car itself was evidence of a crime, it could and has been retained in official custody since it was seized. As a piece of evidence it could be examined whenever the prosecution felt it necessary to further determine the extent that the piece of evidence shed further light on the crime being investigated.

Undersheriff Howard's observations that there was no blood at the scene but an awful lot in the Dodge caused him to conclude that the victim had been shot in the Dodge. Subsequent examination of the articles in the Dodge, and the confirmation that it was indeed human blood of the type of the victim, took on even more meaning as to where the victim died when Dr. Carlovsky, the pathologist, explained that the victim had bled to death, the body rushing and pumping the blood to the wound in an attempt to preserve body functions in the brain. (A. 69).

It is clear, therefore, that the Dodge was a vital and necessary piece of evidence which was seized in its entirety before the search warrant was returned and that all evidence obtained from the Dodge was properly obtained under authority of the Court.

V. The Exclusionary Rule Should Be Modified.

A. Historical background.

The exclusionary rule, making evidence inadmissible in court if law enforcement officers obtained it by means

forbidden by the Constitution, by statute or by court rules, has been the source of considerable controversy since its wisdom was conceived some 87 years ago in a dictum in *Boyd v. United States* (1886), 116 U.S. 616, 6 S.Ct. 524, 29 L.Ed. 746. Essentially, the rationale supporting the exclusionary rule has purported two justifications for its existence. First, it is indisputably urged that the integrity of the Constitution must be maintained, which it is further claimed cannot be effected if the evil of government participation in illegal conduct is allowed to flourish. Second, it is asserted that excluding evidence will reduce violations of the Fourth Amendment provision that "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated * * *."

It is the latter contention which has become the subject of heated debate. There are several reasons for this. First, there are few who would deny that judicial interpretation of what constitutes an "unreasonable" search and seizure has produced a labyrinth of technical rules, the violation of any of which will render evidence seized inadmissible in court. This phenomenon has been said to have produced an atmosphere in which the well-meaning police officer will find it virtually impossible to comprehend whether his conduct is consistent with a perpetually evolving body of law. Thus, the reasoning goes that a reduction of violations of the search and seizure rules cannot be effected by excluding evidence to the extent that those rules are incomprehensible to the policeman on the street. Second, it is often noted that insofar as the exclusionary rule is operative only in court, it is incapable of deterring police misconduct when conviction of an alleged criminal is not the sole, or even

primary, objective of a particular course of action adopted by the police. Most notable in this regard are such things as the seizure of contraband (e.g., narcotics, gambling paraphernalia), the harrassment of prostitutes, and others which invite the characterization of the police proceeding on a sort of "the end justifying the means" basis. Thirdly, it is alleged that no one, save possibly the criminal, benefits from the exclusion of evidence. Most frequently cited in this regard is the compelling rhetoric of then Judge Cardozo:

> "* * * The criminal is to go free because the constable has blundered. * * * A room is searched against the law, and the body of a murdered man is found. * * * The privacy of the home has been infringed, and the murderer goes free." *People v. Defore* (1926), 242 N.Y. 13, 21, 23-24, 150 N.E. 585, 587, 588.

B. The rule in practice.

However, when all the arguments for and against the perpetuation of the exclusionary rule have been considered, the question of first importance which emerges is not whether the exclusionary rule actually works to effect the desired reduction of Fourth Amendment violations, but whether, in light of the complexity of search and seizure law today, it is even capable of doing so in the first place. Clearly it would seem that in instances of flagrant and deliberate violation of the fundamental principles declared by the Fourth Amendment the exclusionary rule will serve to give notice to the police that their conduct will not be tolerated and, hopefully, will deter the police from pursuing an illegal course of action. However, this is not to say that a law enforcement officer, believing to have acted in good faith and within the spirit of

the law, will be deterred by a subsequent finding, often years later, that his conduct in a particular situation encroached upon a judicial nuance which, in all likelihood he did not even know existed. It is in this sense that the facts and circumstances of this case should be considered. For one would be hard pressed to explain what right could be said to be vindicated, what deterrent effect accomplished, or in what sense the integrity of the Constitution preserved, should it be said, as the Court of Appeals of the Seventh Circuit has said, that in the instant situations the officers involved subjected the defendant to unreasonable searches and seizures.

We stop at this point to consider the constitutional issue presented by the circumstances of this case. Basically, this issue (whether the officers violated Dombrowski's Fourth Amendment rights) will be considered from two perspectives. The first will consider the facts in light of the rules set out in *Coolidge*. The second will view the facts in light of the policy considerations sketched above for retaining the exclusionary rule.

Though the opinion of a vastly differing court, *Coolidge* can be said to stand for the principle that for the "plain view" exception to the warrant requirement of the Fourth Amendment to be operative two factors must be present: (1) the police officer must have had a prior justification for being where he was when the evidence was discovered; (2) the discovery of the evidence must have been inadvertent.

With these rules in mind, it is clear that the only issue here is whether there was the requisite prior justification in the facts described for the intrusion in the Thunderbird trunk by the officer. The mere fact that the record has shown that the officer who returned to the car had no knowledge or

suspicion of a crime having been committed renders the question of inadvertence academic. Initially, then, if we approach the question of "prior justification" from the negative (i.e., there was no prior justification), we are left to defend the anomalous conclusion that an officer knowing or believing with a high degree of certainty that a dangerous weapon is unaccounted for is not only going beyond the limts of the powers entrusted him, but also violating someone's constitutional rights when he takes action designed to insure that no harm will come from a dangerous weapon out of the control of the one authorized its use. And to those who would say that in this instance the requisite prior justification hinges on the probability of some harm resulting from the illegal capture of that revolver, we would respond with the obvious reminder that if the occasion of each and every crime could be predicted with absolute certainty we would have no case today.

However, in considering the aforementioned facts from the perspective of the rationale said to be the basis for the exclusionary rule, it will be assumed, as the Court of Appeals has found, that there was no prior justification for the intrusion into the automobile and, therefore, the evidence discovered must be suppressed. It is urged that from this perspective the exclusionary rule is exposed as being curiously inept at effecting the deterrent purported by the rule's advocates as justification for its existence.

First, it is established that the deterrence of unlawful activity by the police is an aim of the exclusionary rule. Thus, in *Weeks v. United States* (1914), 232 U.S. 383, 34 S.Ct. 341, 58 L.Ed. 652, in which the suggestion of *Boyd v. United States,* supra, became law, the Court indulged two

assumptions: (1) that exclusion of evidence would discourage illegal behavior, and (2) that there was no feasible alternative for controlling such behavior. As the Court noted, at 232 U.S. 393:

> "* * * If letters and private documents can thus be seized and held and used in evidence against a citizen accused of an offense, the protection of the Fourth Amendment declaring his right to be secure against such searches and seizures is of no value, and, so far as those thus placed are concerned, might as well be stricken from the Constitution. * * *"

Similarly, in *Wolf v. Colorado* (1949), 338 U.S. 25, 69 S.Ct. 1359, 93 L.Ed. 1782, the Court commented, at 338 U.S. 44:

> "* * * Only by exclusion can we impress upon the zealous prosecutor that violation of the Constitution will do him no good. And only when that point is driven home can the prosecutor be expected to emphasize the importance of observing constitutional demands in his instructions to the police."

And in *Elkins v. United States* (1960), 364 U.S. 206, 80 S.Ct. 1437, 4 L.Ed. 2d 1669, the Court said, at 364 U.S. 217:

> "* * * Its [the exclusionary rule] purpose is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it. * * *"

In *Tehan v. United States ex rel. Shott* (1966), 382 U.S. 406, 413, 86 S.Ct. 459, 15 L.Ed. 2d 453, the Court labeled deterrence the "single and distinct" purpose of the exclusionary rule. *Linkletter v. Walker* (1965), 381 U.S. 618, 85 S.Ct. 1731, 14 L.Ed. 2d 601, referred to the exclusionary

rule as "the only effective deterrent to lawless police action," at 636. And in *Terry v. Ohio* (1968), 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed. 2d 889, the Court, again speaking of the exclusionary rule, said, at 392 U.S. 12:

> "* * * Its major thrust is a deterrent one, * * * and experience has taught that it is the only effective deterrent to police misconduct in the criminal context * * *."

C. Failure of the rule.

Now the very interesting fact is, as Dallin H. Oaks so thoroughly establishes in *"Studying the Exclusionary Rule in Search and Seizure,"* University of Chicago Law Review (1970), Vol. 37, No. 4, that what very little empirical data there is on the deterrent effect is for the most part inconclusive, which leaves us to ponder what Mr. Chief Justice Warren was referring to when he said that "experience has taught" in the aforementioned quote from *Terry*. Indeed, Oaks' study goes to considerable lengths to point out that there has been virtually no empirical basis for the perpetuated assumption that the exclusion of evidence has or will deter the police from unlawful activity.

> "* * * The foregoing findings represent the largest fund of information yet assembled on the effect of the exclusionary rule, but they obviously fall short of an empirical substantiation or refutation of the deterrent effect of the exclusionary rule. * * *" At 709.

Furthermore, Oaks points out a number of reasons why, notwithstanding the relative dearth of data, the exclusionary rule is not only inadequate to deter the police from mischievous behavior, but also fosters the effect of turning the criminal loose on society, which thereby becomes the only

one punished by the rule. Among them are the facts that the rule applies only in court, thus leaving police behavior unscrutinized when conviction is not sought; the fact that the police are ill-equipped, as are all but an illustrious few judges and legal scholars, to comprehend the overwhelming complexity of Fourth Amendment case law; that, further, there is no such communication between prosecutors and police as the aforecited quote from *Wolf v. Colorado* would seem to indicate; and that in only the very rare instance will the offending police officer be reprimanded should evidence he secured be suppressed.

And when we come to consider the exclusionary rule in light of the facts of the instant case, the result seems clear that, not unlike Dr. Frankenstein, the courts have become the victims of their own creation. For if we are to find, as the Court of Appeals found, that the police officer involved violated the defendant's constitutional rights and that, consequently, the evidence seized must be excluded, we have accomplished at most the application of another embellishment to an already baroque body of law. Perhaps this case will stand for the principle, should the ruling of the lower court be affirmed, that a police officer should act only when a crisis has arisen and must be restrained, at all costs to common sense and domestic tranquillity, from doing anything to avert that crisis from arising. If deterrence of unlawful police conduct is the aim of the exclusionary rule, we are strained to imagine how that purpose will be furthered by labeling reason "unreasonable," the protection of society "unconstitutional," and a murderer a free man. Certainly, the essential wisdom of the Fourth Amendment has not been corroded to the point of being little more than a shield for the criminal to defend himself from the well-intentioned endeavors of the police.

It must be pointed out, however, that the foregoing has not been designed to attack the alleged goal of deterring unlawful police conduct. Rather it has been designed to suggest the incapacity of the exclusionary rule alone to accomplish that goal and its potential for working an injustice on society by punishing no one, while letting the criminal free. The exclusionary rule is, furthermore, a curiosity of American jurisprudence and as such poses the question of why the exclusion of improperly obtained evidence is a necessary deterrent or vital to the preservation of judicial integrity when no such rule is recognized in other common-law jurisdictions such as England and Canada. The obvious suggestion, here put forth, is that it is not absolutely necessary, and if it is to be preserved, its application should be cautiously limited to only those instances where the alleged police misconduct can be shown to demonstrate a flagrant and deliberate disregard for one's Fourth Amendment rights.

D. Modification of the rule is justified.

The factual setting of the case at hand appears to be ready-made for the Court to use as a basic framework for limiting the exclusionary rule to situations where the balancing of interests will result in the protection of the individual constitutional rights under the Fourth Amendment while at the same time recognizing the interests of the public in the apprehension of criminals.

In the instant case the evidence from the Thunderbird automobile was obtained without benefit of a search warrant. It was obtained by a law enforcement officer with about six months of experience (A. 103). The evidence was obtained as a result of the officer's good-faith belief that a person in

custody, whom he was unable to communicate with at the time, probably had property in the unguarded vehicle which was parked outside of the garage which it was his duty to secure.

There is absolutely no evidence in the record that Officer Weiss was looking for evidence of any other crime and that his motivation was anything other than to secure the property of the person in custody.

Should it be determined that Officer Weiss's actions did in fact violate Dombrowski's Fourth Amendment rights, it is highly possible that all evidence subsequently discovered could be classed as fruit of the poisonous tree. Thus, the people again would be the losers and the exclusionary rule would not serve its purpose—the removal of incentive to violate the Fourth Amendment.

The same can be said for the alleged violation of Dombrowski's Fourth Amendment rights in the seizure of the bloodied mat and sock from the Dodge automobile by Mr. Mauer. The record is clear that Mauer understood that he was acting at the request of the sheriff in picking up significant pieces of evidence from the Dodge to be subjected to certain tests at the Crime Laboratory. He had been advised by the sheriff that a search warrant had been issued and still constituted authority for him to assist the sheriff. Although the record shows that the search warrant had not been returned, as the Court of Appeals determined, even if the warrant had been inadvertently returned prior to Mauer's acts in securing the evidence later used against Dombrowski, it would again be an inadvertent, unintentional act which should not be used against the people of the State to prevent

the conviction of a murderer. The exclusionary rule should not be applied where its application would not serve the avowed purpose of its adoption.

E. The rule should be applied to substantial, flagrant situations only.

The Fifth Circuit recently concluded that the exclusionary rule is not so inflexible that it cannot yield before the reasonableness of a search that is not quite covered by any of the traditional Fourth Amendment justifications. *United States v. Ragsdale* (5th Cir., 11/10/72), 12 Cr. L. 2218.

The first assumption in *Weeks,* that the exclusion of evidence would discourage illegal behavior, might have some validity if we limit the term "illegal" to *intentional, flagrant* violations of a person's Fourth Amendment rights. The problem that arises and which is so apparent from the facts in this case is that there can be unintentional, clearly innocent invasions of protected areas which are not discouraged by the exclusionary rule because the law enforcement officials involved do not know that their acts are illegal. The second *Weeks* assumption, that there is no feasible alternative for controlling such illegal behavior, ignores basic criminal law provisions covering misconduct of public officials such as sec. 946.12 (2), Wis. Stats., which provides for fine and imprisonment for any public officer or employe who does an act which he knows is in excess of his lawful authority.

In addition, civil actions may be brought against public officials for damages under the Civil Rights Act in federal court and under various provisions in state court proceedings.

In many situations the governmental agency employing the offender will be liable for the judgment as provided in sec. 270.58, Wis. Stats.

In his dissent in *Bivens v. Six Unknown Named Agents* (1971), 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed. 2d 619, Mr. Chief Justice Burger condemns the application of the exclusionary rule to vastly dissimilar cases as if they were the same. However, the Chief Justice would not abandon the suppression doctrine until some meaningful alternative can be developed.

We would suggest that while the Court can justifiably suggest that Congress legislate sufficient remedies to protect innocent persons who are sometimes the victims of illegal police conduct, such legislation is not necessary for the Court to reevaluate the exclusionary rule and redefine its application. It is respectfully suggested that the Court adopt the test similar to that proposed by the American Law Institute so that the exclusionary rule would apply only to a violation of constitutional rights which have been shown to be "substantial."

This proposed model code, set out in the appendix to the opinion of Mr. Chief Justice Burger, 91 S.Ct. 2019, provides as follows:

> "* * * In determining whether a violation is substantial the court shall consider all the circumstances, including:
>
> "(a) the importance of the particular interest violated;
>
> "(b) the extent of deviation from lawful conduct;
>
> "(c) the extent to which the violation was willful;

"(d) the extent to which privacy was invaded;

"(e) the extent to which exclusion will tend to prevent violations * * *;

"(f) whether, but for the violation, the things seized would have been discovered; and

"(g) the extent to which the violation prejudiced the moving party's ability to support his motion, or to defend himself in the proceeding in which the things seized are sought to be offered in evidence against him."

Such a redefinition of the exclusionary rule would not disturb *Mapp v. Ohio* (1961), 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed. 2d 1081, since the conduct sought to be controlled in *Mapp* was described as "official lawlessness and flagrant abuse" of the right to privacy, "unconscionable invasions of privacy," and "utter disregard of the enforceable Fourth Amendment"; it can unquestionably be concluded that such a violation would be classed as "substantial" under the suggested standard.

The conduct in *Mapp* is similar to that which occurred in other cases and engendered the following descriptions:

"flagrant disregard of the procedure which Congress has commanded"—*McNabb v. United States* (1943), 318 U.S. 332, 345, 63 S.Ct. 608, 87 L.Ed. 819.

"arbitrary intrusion"—*Wolf v. Colorado* (1949), 338 U.S. 25, 27-28, 69 S.Ct. 1359, 93 L.Ed. 1782.

"flagrantly, deliberately, and persistently violated the fundamental principles declared by the Fourth Amendment"—*Irvine v. California* (1954), 347 U.S. 128, 132, 74 S.Ct. 381, 98 L.Ed. 561.

"willful disobedience of a Constitution they are sworn to uphold"—*Elkins v. United States* (1960), 364 U.S. 206, 223, 80 S.Ct. 1437, 4 L.Ed. 2d 1669.

"arbitrary invasions by government officials"—*Camara v. Municipal Court* (1967), 387 U.S. 523, 528, 87 S.Ct. 1727, 18 L.Ed. 2d 930.

Contrast the above language with the language of the state trial court in its Memorandum Decision on Motions After Verdict (A. 73):

> "* * * In this Court's opinion, the conduct of the officer seems to be one of reasonableness, for he was not at the time of searching the automobile looking for any incriminating evidence, but was following what he termed to be a standard operating procedure in police work relative to safeguarding the property of Dombrowski."

Application of the same or similar standards as suggested in the American Law Institute proposal to the case at hand would demonstrate clearly that the actions taken by Officer Weiss and Crime Laboratory specialist Mauer did not constitute a substantial violation of Dombrowski's Fourth Amendment rights.

It would appear to be one testimony to the wisdom of our federalism that this Court has the power to diagnose whenever necessary and cure its own ills. When the time for judicial change is clearly recognized the Court can and will change. When subsequent events reveal the need the Court will remove or severely limit the binding power of a particular holding.

Prior to *Dombrowski v. Pfister* (1965), 380 U.S. 479, 85 S.Ct. 1116, 14 L.Ed. 2d 22, it had been a principle of long-standing that a federal court would not interefere with a state court's good-faith administration of the criminal

laws while or before that administration was in progress. The principle of comity was hailed as superceding any constitutional interest the federal court might have in a pending state criminal proceeding. However, *Dombrowski* appeared to many to provide an invitation for an aggrieved defendant to seek the ruling of a federal court as to the constitutionality of the law under which his prosecution was pending. The deluge began, the wisdom of the principle of comity threatened, and subsequently the Court acted in *Younger v. Harris* (1971), 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed. 2d 669, and a series of companion cases, to set down new guidelines for justifiable federal court interference with state criminal proceedings. Some courts, including the lower court in *Younger*, had concluded that *Dombrowski* had authorized federal courts to give equitable relief without regard to any showing of bad faith or harassment whenever a state statute was found on its face to be vague or overly broad in violation of the First Amendment. *Younger* reinstated the pre-*Dombrowski* rulings that irreparable injury usually established by bad faith and harassment must be shown to justify federal intervention.

The point of this all is to suggest an analogy between the Court's dealing with the abstention doctrine in *Younger* and its power to deal in this case with the exclusionary rule.

CONCLUSION

For the foregoing reasons petitioner submits that the lower court changed the trial court findings without such findings being "clearly erroneous" within the meaning of Rule 52 (a), Federal Rules of Civil Procedure, and further submits that the actions of Officer Weiss in recovering incriminating evidence of murder in the Thunderbird automobile and the actions of Crime Laboratory specialist Mauer

in recovering evidence from the Dodge automobile did not amount to unreasonable searches and seizures proscribed by the Fourth Amendment. In any event, the exclusionary rule should not be applied under the circumstances of this case. Petitioner urges that the judgment of the United States Court of Appeals for the Seventh Circuit be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. 72-586

ELMER O. CADY, WARDEN,

Petitioner,

v.

CHESTER J. DOMBROWSKI,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF FOR RESPONDENT

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ELMER O. CADY, WARDEN,

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ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF FOR RESPONDENT

OPINIONS BELOW

The opinion of the Court of Appeals is reported as *Dombrowski v. Cady* (7th Cir. 1972), 11 Cr. L. 2289, and is printed in the appendix to the petition. The opinion of the District Court is reported as *Dombrowski v. Cady* (E.D. Wis. 1970), 319 F. Supp. 530 (A. 22). The opinion of the Supreme Court of Wisconsin is reported as *State v. Dombrowski* (1969), 44 Wis. 2d 486, 171 N.W.2d 349.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

United States Constitution, Amendment Four:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

United States Constitution, Amendment Fourteen:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Rule 52(a) of the Federal Rules of Civil Procedure:

> In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purpose of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a

master, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b).

Rule 81(a)(2) of the Federal Rules of Civil Procedure:

Rule 81 – Applicability In General
(a) To What Proceedings Applicable.

* * * * *

(2) These rules are applicable to proceedings for admission to citizenship, habeas corpus, and quo warranto, to the extent that practice in such proceedings is not set forth in Statutes of the United States and has heretofore conformed to the practice in civil actions.

* * * * *

(as amended Feb. 28, 1966, eff. July 1, 1966; Dec. 4, 1967, eff. July 1, 1968) 28 U.S.C. App. (1964), as amended, (Supp. V, 1965-1969).

28 U.S.C. §2243:

§2243 Issuance of writ; return; hearing; decision

* * * * *

The Court shall summarily hear and determine the facts, and dispose of the matter as law and justice require.

June 25, 1948, c. 646, 62 Stat. 965.

28 U.S.C. §2254(d) & (e):

§2254 State custody; remedies in Federal courts

* * * * *

(d) In any proceeding instituted in a federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a state court, a determination after a hearing on the merits of a factual issue, made by a state court of competent jurisdiction in a proceeding to which the applicant for the writ and the state or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the Respondent shall admit–

(1) that the merits of the factual dispute were not resolved in the state court hearing;

(2) that the fact finding procedure employed by the state court was not adequate to afford a full and fair hearing;

(3) that the material facts were not adequately developed at the state court hearing;

(4) that the state court lacked jurisdiction of the subject matter or over the person of the applicant in the state court proceeding;

(5) that the applicant was an indigent and the state court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the state court proceeding;

(6) that the applicant did not receive a full, fair, and adequate hearing in the state court proceeding; or

(7) that the applicant was otherwise denied due process of law in the state court proceeding;

(8) or unless that part of the record of the state court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such

factual determination, is produced as provided for hereinafter, and the federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record:

And in an evidentiary hearing on the proceeding in the federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the state court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the state court was erroneous.

(e) If the applicant challenges the sufficiency of the evidence adduced in such state court proceeding to support the state court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the state shall produce such part of the record and the federal court shall direct the state to do so by order directed to an appropriate state official. If the state cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the state court's factual determination.

* * * * *

June 25, 1948, c. 646, 62 Stat. 967; Nov. 2, 1966, Pub. L. 89-711, §2, 80 Stat. 1105.

QUESTIONS PRESENTED

1. Whether the second warrantless search by an officer of the Ford Thunderbird at the Kewaskum garage, two and one quarter hours after Dombrowski's arrest for drunk driving, and while Dombrowski was hospitalized under police guard in a different city, was reasonable and justifiable under the exigencies of the situation and within the proscriptions of the Fourth and Fourteenth Amendments of the United States Constitution.

2. Whether the discovery of a sock and floormat by a state crime laboratory representative in a third search of the Dodge, occurring subsequent to the execution of a search warrant authorizing a search of such vehicle, was inadvertent and therefore reasonable within the plain view doctrine.

3. Whether this Court should in effect modify Wisconsin's Exclusionary Rule adopted prior to the *Mapp* decision.[1]

STATEMENT OF THE CASE

Chester J. Dombrowski petitioned the District Court in forma pauperis for writ of habeas corpus alleging that he was being illegally detained by the Warden of the Wisconsin State Prison by virtue of a conviction and

[1] Respondent has merely restated Petitioner's Question No. 4. Since this issue was not briefed to nor considered by the Court of Appeals, nor raised by Petitioner in the District Court, Supreme Court of Wisconsin, or County Court of Fond du Lac County, Wisconsin, Respondent does not agree to the appropriateness of this issue for resolution by this Court. See *infra* pp. 36-37.

sentence obtained contrary to his federal constitutional rights. (A. 5,7). Dombrowski was convicted of first degree murder on July 18, 1968, after a trial by jury in County Court Branch II, Fond du Lac, Wisconsin. (A. 7,8). He was sentenced to life imprisonment, which sentence he is presently serving. (A. 7). A divided Wisconsin Supreme Court affirmed the conviction in *State v. Dombrowski*, 44 Wis.2d 486, 171 N.W.2d 349 (1969). The District Court, the Honorable Myron L. Gordon, presiding, entered a decision and order denying the petition. (A. 6). It is reported as *Dombrowski v. Cady*, 319 F.Supp. 530. (E.D. Wis. 1970). Dombrowski filed a Notice of Appeal from such order and the District Court issued a certificate of probable cause. (A. 6). On June 2, 1972, the United States Court of Appeals for the Seventh Circuit reversed and remanded with direction to grant the relief prayed for in the petition unless the Wisconsin authorities grant Dombrowski a new trial within a reasonable period to be set by the District Court. A petition for rehearing and suggestion for hearing en banc were denied on July 24, 1972. On August 15, 1972, the District Court entered an order providing that the state was to notify the Court within 20 days of its decision on whether to retry Dombrowski and providing that any such retrial was to be held within 90 days. On September 1, 1972, a counsel for Petitioner in response to said order advised the Court that the Fond du Lac County District Attorney intends to retry Dombrowski if this Court does not reverse the Court of Appeals decision and order. (R. Letter, 9/1/72 to Hon. Myron L. Gordon from Mary V. Bowman, an attorney for Cady). Further proceedings have been stayed pending action by this Court.

By stipulation and order the record before the District Court consisted of the entire state court record, including pleadings, transcripts and briefs filed in the Wisconsin Supreme Court and the records relating to a pretrial request to the Wisconsin Supreme Court for a writ of prohibition. (A. 5). These documents were designated as Exhibits A through E. (A. 5).

On September 11, 1967, Chester J. Dombrowski was involved in a one car automobile accident north of Kewaskum, Wisconsin, while driving a Thunderbird at about 10:30 p.m. (A. 106-107, 109). The vehicle was damaged and rendered inoperative. Dombrowski, a police officer, summoned the sheriff's office to the scene. (A. 108-109). Dombrowski met with Officers Boudry and Weiss at the Glacier Inn in Kewaskum. (A. 107-108). Dombrowski told the officers his occupation and advised them that there were no others involved in the accident and that he was alone. (A. 109). At the accident scene, Dombrowski gave the officers three different accounts of how the accident had occurred. (A. 109). He furnished his license and identification. (A. 81).

The officers investigated the accident and called a wrecker for Dombrowski's damaged vehicle. (A. 81, 89, 107). Just prior to the vehicle's removal from the scene, Officer Boudry searched through the inside of the car, including under the seat, in the glove compartment and the back seat. (A. 110). The officer was searching because Dombrowski said he was a police officer but he had no gun on him. (A. 110). No weapon was found during the search nor was any item seized. The officer locked the car doors. (A. 110). The car was removed to a private garage, (Honeck's) in Kewaskum. (A. 90).

The officers and Dombrowski left the accident scene at 11:33 p.m. (A. 104). Dombrowski was taken to the

sheriff's office at West Bend, Wisconsin. (A. 81). At the sheriff's office, Dombrowski conferred with Assistant District Attorney Aldwin Seefeldt. (A. 81-82). Dombrowski was arrested for drunk driving at approximately 11:58 p.m. on September 11, 1967. (A. 82, 89). After his arrest, Dombrowski was taken by the officers to the West Bend Police Department where Dombrowski refused to take a breathalyzer or "chem" test. (A. 82-83). Dombrowski was then taken to a hospital in West Bend for treatment of some injuries he received in the accident and remained in the hospital under guard. (A. 83-86).

While Dombrowski was at the West Bend police station Officer Weiss observed him to be incoherent at times. (A. 83). At the hospital at 2:00 a.m. Dombrowski was uncommunicative. (A. 105). Thereafter, the officers called Dombrowski's wife to find out about his health. (A. 85, 106).

Some two and one quarter hours after Dombrowski's arrest for drunk driving and while Dombrowski remained in the hospital under guard, Officer Weiss traveled from the hospital at West Bend to Honeck's Garage in Kewaskum and searched the entire Dombrowski car again. (A. 86, 89, 93-95, 104). The search was conducted without a search warrant and without Dombrowski's consent. (A. 89).

During this search, the officer seized numerous items from the locked trunk of the vehicle and removed them to the sheriff's office in West Bend. (A. 94-96, 97-102). The items were seized as they appeared to have blood on them. (A. 96). These items were subsequently introduced into evidence against Dombrowski at his trial. (A. 97-102).

Because of his arrest for drunk driving and his being retained in custody without bail, Dombrowski retained the services of an attorney, Clyde Schloemer, of West Bend. By virtue of such retention and in his professional capacity, Mr. Schloemer had visited and conferred with Dombrowski on the afternoon of September 12, 1967. (R. Ex. E, Br. in Support of Writ of Prohibition, p. 3). Schloemer then communicated with Robert Kauffman, District Attorney for Washington County, who was waiting in the hospital corridor and related to him information obtained in his conversation with Dombrowski. (R. Ex. C. p. 122-124).

Following this conversation, law enforcement officials conducted an extensive search of Dombrowski's brother's farm, Dombrowski's 1960 Dodge and the home located on the farm. (A. 167-177).[2] During this search, the body of Mr. McKinney was found. (A. 175-176).

That evening application was made for a search warrant to search Dombrowski's 1960 Dodge and the Thunderbird.[3] (A. 40-45). That evening right after obtaining the

[2]This testimony was printed in the appendix with a notation that it was considered by petitioner to be unnecessary under Rule 36(3) but printed at the request of the respondent although the portions of testimony were considered by petitioner not to be a part of the record on file with the District Court and not a part of the record filed with this Court. (A. 167). Although not initially filed with this Court, transcripts of this testimony were subsequently located and certified by the Clerk of the District Court as part of the record in this matter.

[3]A third search of the Thunderbird was conducted on September 12, 1967, in West Bend pursuant to the search warrant issued by the County Court of Fond du Lac County, Wisconsin on September 12, 1967. (A. 35, 173). A rental agreement was found in the Thunderbird as a result of this search, but the evidence obtained from this search was suppressed by the County Court of Fond du Lac County because it was issued beyond the territorial jurisdiction of the Court. (A. 36, 62-63).

search warrant Undersheriff Howard searched the Dodge and had it removed from the farm by a wrecker. (A. 172-173). On the next day, September 13, 1967, Undersheriff Howard prepared his return to the search warrant listing the items that he found in the search of the 1960 Dodge. (A. 172-173). The return listed not only items discovered in the search of the Dodge, but other items that were found outside of the car on the premises. (A. 33, 173). Subsequently, on September 13, 1967, the day after execution of the search warrant for the 1960 Dodge, a representative of the State Crime Laboratory conducted a third search of the 1960 Dodge, while it was located at the Fond du Lac County Sheriff's Garage. (A. 153-154, 158). The State Crime Laboratory representative did not make any recoveries from the car while it was located in the farm area. (A. 155). No further warrant for the search of the car had been obtained, but the State Crime Laboratory representative stated that he was acting in the capacity of the Sheriff's Department of Fond du Lac County. (A. 155-156). The items that were recovered by the State Crime Laboratory representative were not listed and attached to the search warrant as a return. (A. 156). The items seized in this third search of the 1960 Dodge were also introduced in evidence at Dombrownski's trial. (A. 153-154).

Mr. Dombrowski was charged with first degree murder of Mr. McKinney. (A. 7). Following denial of pretrial motions to supress evidence, Mr. Dombrowski was tried before a jury which returned a guilty verdict. (A. 7,55).

Throughout the Petitioner's brief in this matter, it is critically asserted, directly or by inference, that the United States Court of Appeals for the Seventh Circuit reversed the District Court without having the benefit of the state court record, Ex. A,B,C,D, and E. (Petitioner's Br. pp. 9, 10, 11, 16, 17, 20). This is absolutely not true.

On July 21, 1971, the Clerk of the District Court sent to the Clerk of the Court of Appeals by certified mail the state court record, which had been forwarded on February 1, 1971. (R. Letter dated 7/21/71 to Carrick from LaFave with certified mail receipt 573365 attached). The records of the Clerk of the Court of Appeals indicates that these documents were received and filed. An examination of the state court record itself, Ex. A, B, C, D, and E, which are on file with this Court indicate that they bear the filing stamp of the Clerk of the Court of Appeals dated July 28, 1971. See, for example, page 1 of the trial transcript. (R. Ex. C. p. 1).

SUMMARY OF ARGUMENT

The Court of Appeals was not bound by the District Court findings and could make an independent examination of the record when constitutional issues require the resolution of factual matters. *Napue v. Illinois*, 360 U.S. 264, 271-272 (1959). This is particularly true when the dispute between the parties is not so much over elemental facts as over the constitutional significance to be attached to them especially in habeas corpus action in which the state court record is equally available to both courts. *Neil v. Biggers*, ____ U.S. ____, 93 S. Ct. 375, 379n. 3 (1972).

Officer Weiss' conduct constituted a search of the Thunderbird. It was conceded by Petitioner in the Court of Appeals to be a search and not an inspection. In any event the constitutionality of the action is not dependent upon the labels that the state applies to the act. *Sibron v. State of New York*, 392 U.S. 40, 61 (1968).

Whether a search and seizure are valid is a question of federal constitutional law. *Kluck v. State*, 37 Wis.2d 378,

386, 155 N.W.2d 26, 29 (1967). Evidence obtained by an illegal search and seizure is inadmissible in Wisconsin criminal trials. *Hoyer v. State*, 180 Wis. 407, 417, 193 N.W. 89, 93 (1923); *State v. Kroening*, 274 Wis. 266, 272-276, 79 N.W.2d 810, 814-816 (1954); *Mapp v. Ohio*, 367 U.S. 643 (1961).

Fourth Amendment principles apply to automobile searches. *Coolidge v. New Hampshire*, 403 U.S. 443, 461-462 (1971). The Fourth Amendment requires adherence to judicial processes. *Chimel v. California*, 395 U.S. 752, 763 (1969). The burden is on those seeking an exemption from the search warrant requirement to show the need for it. *Ibid* at p. 762. Searches conducted outside the judicial process are, *per se*, unreasonable under the Fourth Amendment, subject only to a few specifically established and well delineated exceptions. *Katz v. United States*, 389 U.S. 347, 357 (1967).

Officer Weiss' conduct at 2:13 a.m. (2-1/4 hours after Dombrowski's arrest) in traveling from a hospital in West Bend (where Dombrowski, a Chicago police officer, was under arrest, guarded and being treated) and making a second warrantless search of Dombrowski's Thunderbird (which had been rendered inoperative in an accident, previously searched, locked and towed to a private garage in Kewaskum) without Dombrowski's consent and without even asking Dombrowski whether he had his service revolver with him (the alleged object of the search) was unreasonable and violative of Dombrowski's right of privacy. *Carroll v. United States*, 267 U.S. 132, 153, 156 (1925); *Preston v. United States*, 376 U.S. 364 (1964). The Thunderbird had not been seized by police for forfeiture under state law and was not in police custody. Cf. *Cooper v. California*, 386 U.S. 58 (1967); Cf. *Harris v. United States*, 390 U.S. 234 (1968).

The discovery of a white sock and floormat by a State Crime Laboratory representative in a third search of Dombrowski's Dodge occurring a day subsequent to the execution of a search warrant for the Dodge, after the Dodge was towed away and the return of the warrant prepared (which did not include these items) was not inadvertent and not reasonable within the plain view doctrine. *Coolidge v. New Hampshire*, 403 U.S. 443, 467-468 (1971). Once the search warrant for the Dodge had been executed and the return prepared it was *functus officio*. 79 C.J.S. Searches and Seizures, §83, p. 897.

A modification of the exclusionary rule was not considered by the courts below. It should not be considered by this Court, *Bivens v. Six Unknown Named Agents*, 403 U.S. 388, 397-398 (1971). In asking this Court to modify the exclusionary rule enunciated in *Mapp v. Ohio*, 367 U.S. 643 (1961), Petitioner is in reality asking the Court to modify Wisconsin's own exclusionary rule which was adopted by the Wisconsin Supreme Court prior to the *Mapp* decision. *Hoyer v. State*, 180 Wis. 407, 417, 193 N.W. 89, 93 (1923); *State v. Kroening*, 274 Wis. 266, 272-276, 79 N.W.2d 810, 814-816 (1954). In our dual state-federal system the states are permitted to adopt workable rules to meet the demands of effective criminal justice in the state provided they meet the requirements of due process. *Ker v. California*, 374 U.S. 23, 34 (1963). The purpose of Wisconsin's exclusionary rule is the protection of privacy. *Kluck v. State*, 37 Wis.2d 378, 386, 155 N.W.2d 26, 29 (1967).

The exclusionary rule should not be modified at this time. Empirical data concerning the effectiveness of the rule is not conclusive. Oaks, *Studying the Exclusionary Rule on Search and Seizure*, 37 U. Ch. L. Rev. 665

(1970); Majority Report to House of Delegates, American Bar Association, Section on Criminal Law, Concerning the Exclusionary Rule and Senate Bill No. 2567 (92d Congress, 1st Session, as amended), adopted by House of Delegates on February 12, 1973, p. 9. Assuming *arguendo*, that the rule should be modified, modification should be done prospectively by legislative action and provide a meaningful alternative. Law enforcement officials should not be given the impression that all constitutional restraints on police have been removed. *Bivens v. Six Unknown Named Agents*, 403 U.S. 388, 420-422 (1971) [Chief Justice Burger dissenting].

ARGUMENT

I.

THE SECOND WARRANTLESS SEARCH BY AN OFFICER OF THE FORD THUNDERBIRD AT THE KEWASKUM GARAGE, TWO AND ONE QUARTER HOURS AFTER DOMBROWSKI'S ARREST FOR DRUNK DRIVING, AND WHILE DOMBROWSKI WAS HOSPITALIZED UNDER POLICE GUARD IN A DIFFERENT CITY, WAS NOT REASONABLE NOR JUSTIFIABLE UNDER THE EXIGENCIES OF THE SITUATION AND VIOLATED THE FOURTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION.

A. The Court of Appeals was not bound by the District Court's findings

The Court of Appeals was not bound by the District Court's findings "that the examination of the car at the garage was not a search in the *Preston* sense, but rather it was an inspection designed to locate an article of value, to be protected by those responsible for its custody".

(A. 26). An appellate court will not hesitate to undertake independent examination of factual issues when constitutional claims may depend on their resolution. *Napue v. Illinois*, 360 U.S. 264, 271-272 (1959); *Berenyi v. District Director, Immigration and Naturalization Service*, 385 U.S. 630, 636 (1967). This is particularly true where the dispute between the parties is not so much over the elemental facts as over the constitutional significance to be attached to them. Moreover, this is a habeas corpus case in which the facts are contained primarily in the state court record, equally available to the District Court and the Court of Appeals, *Neil v. Biggers*, ____ U.S. ____, 93 S. Ct. 375, 379n. 3 (1972), Cf. *Boulden v. Hulman*, 394 U.S. 478 (1969).[4]

An independent review by the Court of Appeals of the state court record was particularly appropriate in this case since the Petitioner (then Respondent) conceded that Officer Weiss' conduct was a search.

> "The Petitioner on this appeal cites authorities suggesting that it is semantic petifoggery to say that an invasion of an individual's personal security, for purposes of a 'quest' of any kind is not a 'search'. See *District of Columbia v. Little* (D.C. Cir. 1950) cited at p. 14, Brief of Appellant. This writer finds

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[4] As to the applicability of Rule 52(a) F.R. Civ. P. see Rule 81(a)(2), F.R. Civ. P. 28 U.S.C. App. (1964), as amended, (Supp. V, 1965-1969); 28 U.S.C. §2243; 28 U.S.C. §2254(d) & (e); Cf. *Holiday v. Johnson*, 313 U.S. 342, 350-353 (1941); Cf. *Harris v. Nelson* 394 U.S. 286, 292-298 (1969). Some cases have concluded that Rule 52(a), F.R. Civ. P. is applicable to habeas corpus proceedings. See, for example, *Waddy v. Heer*, 383 F.2d 789, 793 (5th Cir. 1967); *Tyler v. Beto*, 391 F.2d 993, 995-996 (5th Cir. 1968). [Both involved factual hearings in the District Courts.]

this particular semantic distinction equally unpalatable, and submits that the proper analysis is epitomized in *Terry v. Ohio*, 392 U.S. 1, *supra*. In that case, the United States Supreme Court demolished as 'nothing less than sheer torture of the English language' the myth that a 'frisk' was not a 'search'. 392 U.S. at 16.***" (Footnote omitted. Respondent's Br.–U.S.C. of A. p. 10)

"Officer Weiss was not required by any regulation or statute to inspect or inventory the contents of petitioner's car. The record shows that the object of his *search* was the service revolver which he believed the petitioner carried with him at all times. (Ex. C, pp. 315, 365). Was this *search* reasonable under all the facts?" (Emphasis added. Respondent's Br. U.S.C. of A. p. 11)

The position taken by Petitioner (then respondent) in the U.S. Court of Appeals was in marked contrast to that taken by the state in the Wisconsin Supreme Court:

"Officer *Weiss did not 'search'* the Thunderbird because he did not act with a 'view to' or intent to discover evidence of any crime. He was acting solely to protect the property of the defendant. . .

"The trial court admitted the evidence, which was seized from the Thunderbird, on the basis that it was seized as a result of a reasonable 'custody' search (R. 91, 207-211). If there was a 'search' at all, it was clearly a reasonable custody search. It is submitted, however, that there actually was no 'search', in the constitutional sense, because the action of Officer Weiss was not undertaken 'with a view to discovery of contraband or evidence of guilt to be used in prosecution of a criminal action'." (Footnote omitted. Emphasis added. R. Ex. B. State's Br. in Wis. Sup. Ct. pp. 22-23)

This position is an abandonment of the basis of the holding of the majority in the Wisconsin Supreme Court:

> "The majority of the court is convinced that the *inspection* was done within a reasonable time of the car's transfer to the Kewaskum garage, and was accomplished while the police were responsible for its protection and were in the process of protecting Dombrowski's property and *were not, at that time, engaged in a search of the car looking for incriminating evidence.*" (Emphasis added. *State v. Dombrowski*, 44 Wis.2d 486, 496 (1969).)

It represents a complete change from the position taken by Petitioner (then respondent) in the District Court:

> "*** In this case, as in *Harris*, the *evidence was not discovered pursuant to a 'search'*, and was therefore not within the Fourth Amendment prohibition." (Respondent's Br., U.S. Dist. Ct. p. 7)

> "In the case of Dombrowski's Thunderbird, *there was no 'search'*." (Respondent's Br., U.S. Dist. Ct. p. 9)

It is also totally inconsistent with the decision and order of the District Court in this action:

> "*** Although the line is a narrow one, I conclude that the *examination of the car* at the garage *was not a search* in the *Preston* sense, but *rather it was an inspection* designed to locate an article of value, to be protected by those responsible for its custody. This was *not a search for incriminating evidence* and is constitutionally permissible under *Harris*." (Emphasis added. 319 F. Supp. at p. 532)

Petitioner should not be permitted to pick and choose its arguments before different courts and to "search" out

new basis for sustaining a search and conviction, especially when inconsistent with its position in the court below. To attempt to reverse the grant of habeas corpus by the Court of Appeals on an entirely different basis than argued in that court should not be permitted. The Respondent is placed in a horrendous position if Petitioner is permitted to flip-flop between legal positions in different courts. This is particularly true when, as here, the original conviction was sustained by a divided state supreme court and the District Court on habeas corpus found the line to be a "narrow one."

B. Fourth Amendment Principles Apply

In *Coolidge v. New Hampshire*, 403 U.S. 443, 461-462 (1971) Justice Stewart noted:

> "The word 'automobile' is not a talisman in whose presence the Fourth Amendment fades away and disappears."

Whether searches and seizures are valid is a question of federal constitutional law.[5] If evidence is secured as a result of a search and seizure that violates constitutional rights of the individual charged with a crime, it is inadmissible.[6]

If such evidence obtained by an illegal search is admitted into evidence and has a prejudicial effect on the defendant's case, then the Fourteenth Amendment due process clause requires that a subsequent conviction be

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[5] *Kluck v. State*, 37 Wis. 2d 378, 386, 155 N.W.2d 26, 29 (1967).

[6] *Hoyer v. State*, 180 Wis. 407, 417, 193 N.W. 89, 93 (1923); *State v. Kroening*, 274 Wis. 266, 272-276, 79 N.W.2d 810, 814-816 (1954); *Mapp v. Ohio*, 367 U.S. 643 (1961).

reversed. *Mapp v. Ohio*, 367 U.S. 643, 655 (1961). *Kluck v. State*, 37 Wis.2d 378, 386, 155 N.W.2d 26, 29 (1967).

C. Officer Weiss' Conduct Constituted a Search of the Thunderbird

Officer Weiss' conduct at 2:13 a.m. on September 12, 1967, going to the Honeck's garage in Kewaskum, unlocking the car, and looking in the interior and then the locked trunk of the automobile constituted a search. (A. 90). This action was described by the prosecution during the course of the trial as a search. (A. 91, 92, 94). Officer Weiss testified that his reason for searching the car was that he was looking for the defendant's service revolver. (A. 91). It should also be noted that the County Court referred to Officer Weiss' conduct as a search in its decision on the pretrial motion to suppress (A. 57-58) and in its memorandum decision on motions after verdict. (A. 71-74).

Upon appeal to the Wisconsin Supreme Court and in the United States District Court, the state and Petitioner, Cady, sought to characterize the officer's action as an "inspection" rather than a search. With respect to the constitutional guarantees of the Fourth Amendment against unlawful search and seizure, there is no distinction in meaning between "search" and "inspect"; unlawful inspection is no less a violation than an unlawful search. 79 C.J.S., Searches and Seizures, §25, p. 795. States may not authorize police conduct which trenches upon Fourth Amendment rights, regardless of the label which it attaches to the conduct. *Sibron v. State of New York*, 392 U.S. 40, 61 (1968). In *Terry v. Ohio*, 392 U.S. 1, 16 (1968) the Court demolished as "nothing less than sheer torture of the English language" the myth that a "frisk" was not a "search". The focus of the Fourth Amendment

is on privacy, not on whether the conduct is described as an inspection or a search.

D. Fourth Amendment Requires Adherence to Judicial Processes

In *Chimel v. California*, 395 U.S. 752, 762 (1969), this Court said:

> "Only last Term in *Terry v. Ohio*, 392 U.S. 1, we emphasized that '[t]he police must, whenever practicable, obtain advance judicial approval of searches and seizures through the warrant procedure,'*** and that 'the scope of [a] search must be "strictly tied to and justified by" the circumstances which rendered its initiation permissible.' "

The burden is on those seeking an exemption from the search warrant requirement to show the need for it. *Chimel v. California*, 395 U.S. at p. 762 (1969); *United States v. Jeffers*, 342 U.S. 48, 51 (1951). Searches conducted outside the judicial process are, *per se*, unreasonable under the Fourth Amendment, subject only to a few specifically established and well delineated exceptions. *Katz v. United States*, 389 U.S. 347, 357 (1967), (cited with approval in *Chimel v. California*, 395 U.S. at p. 763.) As a general rule, the Fourth Amendment requires as the requisite to the issuance of a search warrant the judgment of a neutral and detached magistrate on the probable cause issue. Only in exigent circumstances will the judgment of the police as to probable cause serve as a sufficient authorization for a search. *Chambers v. Maroney*, 399 U.S. 42, 51 (1970).

Officers conducting warrantless searches of an automobile must have "reasonable or probable cause" to believe that they will find the instrumentality of a crime or

evidence pertaining to a crime before they begin their warrantless search. *Dyke v. Taylor Implement Mfg. Co.*, 391 U.S. 216, 221 (1968).

E. Exceptions to Judicial Process

Recognized exceptions include the following:

(1) Search of an automobile when probable cause exists and it is not practical to secure a warrant because the vehicle can be quickly moved. *Carroll v. United States*, 267 U.S. 132, 153, 156 (1925). Although the Court made it clear that "[i]n cases where the securing of a warrant is reasonably practicable, it must be used, . . ." *Id.*, p. 156.

(2) Search of an automobile seized by police for forfeiture under state law. *Cooper v. California*, 386 U.S. 58, 62 (1967).

(3) Discovery of evidence in plain view, not the result of a search, but of a measure taken to protect an automobile while it was in police custody. *Harris v. United States*, 390 U.S. 234, 236 (1968).

(4) Search incident to arrest of the area within arrestee's immediate control. *Chimel v. California*, 395 U.S. 752, 763 (1969).

and others not material to this case and these facts. Failure to comply with the search warrant requirement can only be excused by exigent circumstances. *Chambers v. Maroney*, 399 U.S. 42, 51 (1970); *Terry v. Ohio*, 392 U.S. 1, 20 (1968).

F. Recognized Exigent Circumstances Contrasted To Officer Weiss' Conduct

No exception is supported by this record. This is clearly a wholesale intrusion on the personal privacy and security of Dombrowski without probable cause authorized by a neutral and detached magistrate. See, *Davis v.*

Mississippi, 394 U.S. 721, 726 (1969); *Katz v. United States*, 389 U.S. 347, 356 (1967).

1. *Officer Weiss' Conduct Cannot Be Justified As A Search Incident to Arrest*

This case closely parallels *Preston v. United States*, 376 U.S. 364 (1964). In *Preston* the defendants were arrested by state officers on a vagrancy charge while sitting in a parked automobile and were convicted of conspiracy to rob a bank largely on evidence obtained by the state officers' search of the car after the defendants had been arrested, searched and taken to police headquarters, and the car had been removed to a garage.

Justice Black, speaking for the unanimous Court in *Preston*, stated that this Court's cases "make it clear that searches of motor cars must meet the test of reasonableness under the Fourth Amendment before evidence obtained as a result of such searches is admissible." 376 U.S. at p. 366. Justice Black noted that it was argued that the search was incident to an arrest and that such searches are justified by the need to seize weapons and other things which might be used to assault an officer, to effect an escape, as well as the need to prevent the destruction of evidence of the crime.

Justice Black stated, however :

> " . . . But these justifications are absent where a search is remote in time or place from the arrest. Once an accused is under arrest and in custody, then a search made at another place, without a warrant, is simply not incident to the arrest." 376 U.S. at p. 367.

The Court assumed that either because the arrests were valid or because the police had probable cause to think the car stolen, the police had the right to search this car when they first came on the scene. The Court continued:

"... But this does not decide the question of the reasonableness of a search at a later time and at another place. See *Stoner v. California*, post, p. 483. The search of the car was not undertaken until petitioner and his companions had been arrested and taken in custody to the police station and the car had been towed to the garage. At this point there was no danger that any of the men arrested could have used any weapons in the car or could have destroyed any evidence of a crime—assuming that there are articles which can be the "fruits" or "implements" of the crime of vagrancy. Cf. *United States v. Jeffers*, 342 U.S. 48, 51-52 (1951). Nor, since the men were under arrest at the police station and the car was in police custody at a garage, was there any danger that the car would be moved out of the locality or jurisdiction. See *Carroll v. United States, supra*, 267 U.S. at 153. We think that the search was too remote in time or place to have been made as incidental to the arrest and conclude, therefore, that the search of the car without a warrant failed to meet the test of reasonableness under the Fourth Amendment, rendering the evidence obtained as a result of the search inadmissible." 376 U.S. at p. 368.

In a recent case, factually similar to the instant case, the United States Court of Appeals for the Ninth Circuit, in *Barrentine v. United States*, 434 F.2d 636 (9th Cir. 1970), held that officers, who had arrested defendant on a drunk driving chage, had no probable cause to believe that evidence pertaining to such offense had been concealed in defendant's automobile or that the vehicle contained contraband, and thus, warrantless search of the car's trunk, which revealed sawed-off shotgun, was not reasonably incident to defendant's arrest and was illegal. The Court stated:

"The officers had no probable cause to believe that evidence of the offense for which appellant was arrested had been concealed in the automobile. There was no probable cause to believe that the vehicle contained contraband. The search of the trunk was not reasonably incident to appellant's arrest. The search was not of a vehicle subject to forfeiture proceedings. There were no exigent circumstances conceivable justifying the trunk search. Accordingly, the search was illegal. (*Chambers v. Maroney* (1970) 399 U.S. 42, 90 S.Ct. 1975, 26 L.Ed. 2d 419; *Dyke v. Taylor Implement Mfg. Co.* (1968) 391 U.S. 216, 88 S.Ct. 1472, 20 L.E. 2d 538; *Preston v. United States* (1964) 376 U.S. 364, 84 S.Ct. 881, 11 L.Ed. 2d 777.)" 434 F.2d p. 637.

See also *United States v. Joyner*, 8 Cr. L. 2411, 2412 (E.D. Pa. 1971) holding unreasonable a second search of a car trunk without a warrant by an officer after the defendant had been arrested, taken into custody and the trunk of the vehicle initially searched with the consent of the driver.

In the instant case, like *Preston, Barrentine,* and *Joyner*, Dombrowski was arrested on a different charge, drunk driving, his automobile was serached at the accident scene, the car was locked and towed away to a private garage. Dombrowski was taken to the sheriff's office, police headquarters and then to a hospital under guard. While he was in the hospital, Officer Weiss traveled to a private garage in another city, to which the car had been towed, to conduct a second warrantless search of the Dombrowski car. This case is even stronger as Dombrowski was not only in custody but in the hospital under guard as a result of injuries he had sustained and the car, which had been locked and towed away, was damaged and inoperative.

The second search of the Dombrowski car was without warrant, consent or probable cause. The alleged justification for this warrantless search, "looking for Dombrowski's service revolver," establishes that the officer did not have "reasonable or probable cause" to believe that he would find the instrumentality of a crime or evidence pertaining to a crime. Accordingly, it is properly identified as overreaching governmental conduct, for which the exclusionary rule of *Mapp v. Ohio*, 367 U.S. 643, 655 (1961) was fashioned as a sanction to redress and deter because prohibited by the Fourth Amendment. *Davis v. Mississippi*, 394 U.S. 721, 726 (1969), [citing *Terry v. Ohio*, 392 U.S. 1, 19 (1968)]

There is no question that Dombrowski was under arrest and in custody when his vehicle was searched at Honeck's Garage. Therefore, the search was not necessary to protect the officers or to prevent the destruction of evidence since neither Dombrowski nor anyone associated with him had any control over the vehicle or its contents.[7] The car was in a damaged condition and unable to be driven. In addition, the state failed to sustain its burden of proof, under the fact circumstances of Dombrowski being in custody in a hospital in one city and the damaged and inoperative vehicle having been locked and towed away to another city, why speed was essential and why it was not reasonably practicable to apply to a magistrate for a search warrant if probable cause existed. *United States v. Jeffers*, 342 U.S. 48, 51 (1951).

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[7] See *United States v. Harvey*, 397 F.2d 526, 529 (7th Cir. 1968).

2. *Officer Weiss' Conduct Cannot Be Justified As a Search of a Vehicle in Police Custody*

Nor can the second search of the Dombrowski vehicle be justified either as the search of an automobile seized by police for forfeiture under state law or as the discovery of evidence, in plain view, not the result of a search, but of a measure taken to protect an automobile while it was in police custody.

The case is unlike *Cooper v. California,* 386 U.S. 58 (1967) which involved the search of an automobile seized pursuant to Section 11611 of the California Health & Safety Code which provides that any officer making an arrest for a narcotics violation shall seize and deliver to a designated state agency any vehicle used to store, conceal, transport, sell or facilitate the possession of narcotics and hold as evidence the vehicle until a forfeiture has been declared or a release ordered. In this case it must be conceded that no state law of Wisconsin authorizes the taking into custody by police an automobile belonging to a person involved in an automobile accident. This is likewise true of a car driven by a person arrested for drunken driving. The vehicle in this case was not impounded as evidence. Petitioner concealed in the United States Court of Appeals that Officer Weiss was not required by any regulation or statute to inspect or inventory the contents of Dombrowski's car. (Respondent's Br. in U.S.C. of A. p. 11).

The Wisconsin Legislature recently (but subsequent to the trial of the instant matter), saw fit to pass several new laws permitting the seizure of vehicles and retention by police when the vehicles have been used or employed in the unlawful sale of transportation of narcotics, danger-

ous drugs or gambling devices.[8] Previously (and specifically at time of the instant search) a vehicle was subject to seizure only in connection with certain cigarette tax matters.[9]

In the instant case there was no police regulation similar to *Harris*. In fact, the record clearly establishes that this vehicle was never considered by the Washington County Sheriff's office to be in their care, custody or control. It was not taken to the Sheriff's office in West Bend, but was towed by a wrecker to a private garage (Honeck's) in Kewaskum, another city. (A. 90) It was left outside of the garage. (A. 71) No one from the Sheriff's Department remained with the car. (A. 91) In addition, the car had been searched at the scene of the accident and then dutifully locked by Officer Boudry. (A. 110) Nothing Weiss did was done to protect the automobile or its contents and the record supports no other conclusion. It strains the imagination to believe that any alleged police "responsibility" for the car and its contents could require more than Officer Boudry's actions at the scene prior to the removal of the vehicle.

The police custody situation related in *Harris v. United States*, 390 U.S. 234 (1968) was approved on the thesis that the evidence was discovered not as a result of a search of the car, but on the basis of a measure taken to protect the car while in police custody. In *Harris* the petitioner's automobile had been seen leaving the site of a

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[8] §151.18 Wis. Stats., effective December 7, 1969, Laws of Wis. 1969, Ch. 252; §161.29 Wis. Stats., effective December 7, 1969, Ch. 252 §6; §945.03(3), Wis. Stats., effective December 7, 1969, Laws of Wis. 1969, Ch. 252 §30; §161.45 Wis. Stats., effective February 20, 1970, Laws of Wis. 1969, Ca. 384 §22.

[9] §139.40, Wis. Stats. (1967).

robbery. It was traced to Harris and he was arrested as he entered it. After a cursory search of the car, the arresting officer took Harris to a police station. They decided to *impound the car as evidence,* and a crane was called to tow it to the precinct. The windows of the car were open and the door unlocked. A Metropolitan Police Regulation required an officer impounding a vehicle to search it, remove all valuables and to attach to the vehicle a property tag listing certain information. In *Harris* the arresting officer pursuant to the regulation proceeded to the precinct station lot where the car had been towed, to search the vehicle, place a property tag on it, roll up the windows and lock the doors. While securing one of the windows and doors,he observed a registration card on the door ledge which was later used in evidence. 390 U.S. at p. 235. Under what this Court characterized to be "these narrow circumstances" it held that the Fourth Amendment did not require the police to obtain a warrant. 390 U.S. at p. 236. In essence, the evidence fell in "plain view" of an officer who had a right to be in that position.

In the instant case the officers made no decision to impound the car as evidence. Nor was the officer authorized by any state law to do so. Cf. *Cooper v. California*, 386 U.S. 58 (1967). In Dombrowski's case the car was searched and secured at the accident scene and towed to a private garage. Some 2½ hours later Officer Weiss traveled from West Bend to Kewaskum to search for the defendant's service revolver in the locked car, not to take any measure to protect the automobile while it was in police custody—it in fact was not in police custody but at a private garage. In the Dombrowski case the officer was not tagging or securing the car. In fact he had to unlock it to search it. In the Dombrowski case the items seized were not in "plain view" while the car was being secured but in the locked trunk of the car.

3. *Officer Weiss' Warrantless Search of the Thunderbird Cannot Be Justified as a Reasonable Act To Secure Dombrowski's "Gun"*

The second search of the Thunderbird was unreasonable and not compelled by exigent circumstances. At the accident scene, Officers Boudry and Weiss knew that Dombrowski was a Chicago Police Officer. (A. 109) Although inquiring about other matters, they did not ask Dombrowski whether police regulations required him to have his gun with him when he was off duty and not in his jurisdiction, whether he had his gun with him and, if so, where it was located. Dombrowski was not incoherent at this time. (A. 103). Instead, Officer Boudry chose to search through the inside of the car, including under the seat, in the glove compartment and in the back seat. (A. 110). No weapon was found. Boudry then locked the car. (A. 110). The car was then towed to a private garage in Kewaskum. (A. 90). No gun was ever found in the vehicle. Assuming, however, that there initially had been reason to believe that a gun was in the car, certainly the locked doors and locked trunk were reasonable protection against the possibility that unknown persons in the middle of the night in a rural area of Wisconsin would gain access to the locked vehicle and locate the gun which Officer Boudry's search failed to locate. At no time following the search did the officers make any inquiry of Dombrowski about the "gun" although they testified that Dombrowski continuously advised them that he was a police officer. (A. 83). Nor does the record show that the officers made any inquiry concerning whether Dombrowski had a gun with him when they talked to Dombrowski's wife by telephone. (A. 85, 106).

Petitioner now seeks to imply that Dombrowski may have had a gun and was incapable of communicating to the officers whether he had a gun with him, where it was located and that the officers should keep it in a safe place. (Petitioner's Br. p. 27). The record clearly fails to support such inferences. No officer asked Dombrowski whether he was required to carry a gun, if he had one, or where it was located. The accident occurred at about 10:30 p.m. Dombrowski called the Washington County Sheriff's office and reported the accident to them and met with the officers at the Glacier Inn in Kewaskum. (A. 107-109). Dombrowski told the officers his occupation. (A. 109). In answer to Officer Boudry's question, Dombrowski advised him that there were no others involved in the accident and that he was alone. (A. 109). He furnished his license and identification. (A. 81). Although at the accident scene Dombrowski gave the officers three different accounts of how the accident had occurred, (A. 109) those inconsistent statements did not demonstrate that he was incapable of advising him, if asked, whether he was required to have a gun with him, if he had such a gun, and if so where it was located. Officer Weiss specifically testified that Dombrowski was not incoherent at this time. (A. 103). Dombrowski was able to answer the inquiries of Assistant District Attorney Aldwin Seefeldt at the Sheriff's office in West Bend prior to his arrest. (A. 81-82). Subsequently, at the West Bend Police Department, Dombrowski was capable enough to refuse to take a "chem" test. (A. 82-83). It was while Dombrowski was at the West Bend Police Station that the officer first observed him to be incoherent at times. (A. 83). It was at the hospital at 2:00 a.m., about 2½ hours after the officers and Dombrowski had left the

accident scene, that Dombrowski was uncommunicative. (A. 105).

It is significant to note that the officers were looking only for Dombrowski's service revolver and made no pretext of concern for safeguarding other valuables or personal property of Dombrowski.[10]

Cabbler v. Virginia, 212 Va. 520, 184 S.E.2d 781 (Va., 1971) relied upon by petitioner (Petitioner's Br. p. 25) is facutally inapposite to what occurred in this case. In *Cabbler*, the officer advised the defendant that his car would be removed to the city garage for safekeeping until his release from custody. The car, before being stored in the city garage, was taken to the police property room where the contents of the car were to be removed, inventoried and stored for safekeeping. It was then that the police discovered the stolen goods that result in Cabbler's later convictions. In the instant matter, no effort was made to safeguard or take Dombrowski's car into police custody for purposes of safekeeping. It was removed from the accident scene to a private garage in Kewaskum, Wisconsin where it remained parked on a lot outside of the garage. No effort was made to guard or safekeep the vehicle nor did the officers intend to take

[10]It is not without doubt that the search for Dombrowski's service revolver was one of innocent purpose rather than a search for incriminatory evidence. For example, it is a criminal offense in the state of Wisconsin to go armed with a concealed and dangerous weapon although an exception is made for peace officers. §941.23 Wis. Stats. (1967). See definition of "peace officer". §§939.22(22), 964.245 Wis. Stats. (1967). The driver of an automobile goes armed within the meaning of the law when he has a dangerous weapon within reach. *Mularkey v. State*, 201 Wis. 429, 432, 230 N.W. 76 (1930).

any further steps to safeguard Dombrowski's personal property. Other than searching for the service revolver, there is nothing to indicate in this record that the police officers intended to remove Dombrowski's personal property, inventory it and store it until his release.

It is important to bear in mind that Dombrowski's Thunderbird automobile was not in police custody in any respect. What took place here was a general exploratory search of an automobile in which Dombrowski had a reasonable expectation of privacy and personal security.[11]

II.

THE DISCOVERY OF A WHITE SOCK AND FLOORMAT BY A STATE CRIME LABORATORY REPRESENTATIVE IN A THIRD SEARCH OF THE DODGE OCCURRING SUBSEQUENT TO THE EXECUTION OF THE SEARCH WARRANT FOR THE DODGE WAS NOT INADVERTENT AND NOR REASONABLE WITHIN THE PLAIN VIEW DOCTRINE

On September 12, 1967, law enforcement authorities conducted an extensive search of Dombrowski's brother's farm, including Dombrowski's 1960 Dodge which was located thereon. (A. 167-177). Undersheriff Howard went up to the Dodge automobile and "looked into" or visually searched it.[12] (A. 167-168). At 8:02 that evening

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[11] Several recent cases have condemned general exploratory searches allegedly done to inventory or inspect property. See *Mayfield v. United States*, 9 Cr. L. 2115 (D.C. Cir. 1971); *United States v. Mossbauer*, 9 Cr. L. 2276-2277 (U.S. Ct. Mil. App. 1971).

[12] The Court of Appeals held that the police were lawfully on the farm and the plain view doctrine justified the seizure of the items that were observed by Howard in the Dodge. (Pet. App. 109-110).

Raymond Howard, Undersheriff, applied for a search warrant for the 1960 Dodge. (A. 40). The search warrant was issued by the County Court of Fond du Lac County, Wisconsin, at 8:15 p.m. on September 12, 1967. (A. 31).[13]

The search warrant for the 1960 Dodge was executed by Undersheriff Howard that evening right after he left the courtroom. (A. 172). The same night that he made the search, he removed the 1960 Dodge from the farm premises. (A. 172). On the next day, September 13, 1967, Undersheriff Howard prepared his return to the search warrant listing the items that he found in the search of the 1960 Dodge. (A. 172-173). The thoroughness of the search appears from the return. The return listed not only the items discovered in the search of the Dodge, but other items that were found outside of the car on the premises. (A. 33, 173). Neither the white sock nor floormat were listed in the return. The return itself does not indicate that it was a "partial" return as

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[13]The Court of Appeals expressly refrained from deciding whether the search warrant for the 1960 Dodge was valid (Pet. App. 110). Dombrowski had challenged by pretrial motion the admissibility of the items seized pursuant to search warrant for the 1960 Dodge. Basically, Dombrowski asserted (1) that the search warrant was void on its face since it failed to particularly describe the place to be searched and the person and things to be seized in violation of the Fourth and Fourteenth Amendments, United States Constitution. [See *Stanford v. State of Texas*, 379 U.S. 476, 485 (1965)], (2) that probable cause had not been established [See *Aguilar v. Texas*, 378 U.S. 108, 114 (1964)] and (3) that the attorney's statement to the police and the testimony of Officer Howard in obtaining the search warrant were the fruit of the unlawful search of the Ford Thunderbird. [See *Wong Sun v. United States*, 371 U.S. 471 (1963); *Alderman v. United States*, 394 U.S. 165, 177 (1969)].

indicated in Petitioner's brief. (A. 33, See Petitioner's Br. p. 6).

Undersheriff Howard described his observations made while conducting the visual search of the car and later when searching pursuant to the search warrant. In the visual search, he said he observed a pillow case covering what appeared to be blood. He could see blood where it ran off of the cushion and was beyond the coverage range of the pillow case. He could see blood on a brief case on the floor and blood splattered on the back of the front seat and on the side of the back seat of the car. (A. 143). In executing the search warrant, the items he found were the items listed in his return. (A. 173). Of the items listed in his return, a necktie, books of matches partially burned and a fresh pile of straw were in fact located outside of the car. (A. 173). There is no evidence in the record which supports the proposition that either the white sock or floormat (Trial Ex. 32 and 37) were ever seen by Undersheriff Howard.

The white sock and floormat (Trial Ex. 32 and 37) were not simply "taken up and labeled" by Mr. Mauer of the State Crime Laboratory. He searched the vehicle. (A. 160). He searched the vehicle the day after the search warrant had been executed by Undersheriff Howard. (A. 158). He searched the 1960 Dodge while it was located at the Fond du Lac County Sheriff's Garage. (A. 158). Mr. Mauer, the State Crime Laboratory representative, did not make recoveries from the car while it was located in the farm area. (A. 155). No further warrant for the search of the car had been obtained, but the State Crime Laboratory representative stated that he was acting in the capacity of the Sheriff's Department of Fond du Lac County. (A. 155-156). The items that were recovered by Mr. Mauer were not listed and attached to

the search warrant as a return. (A. 156). These items seized in the third search of the 1960 Dodge were introduced in evidence at Dombrowski's trial. (A. 153-154).

At the time of Mauer's search, the warrant had already been executed and a return prepared. It cannot thereafter serve as a basis for unlimited additional searches. 79 C.J.S. Searches and Seizures, §83, p. 897.

As the Court of Appeals correctly pointed out, there was no continuing authority under the warrant issued the previous night. First, the white sock and floormat were not described in the warrant and were not observed the night before. Second, when the warrant was returned–before Mauer came on the scene–it was *functus officio.* (Pet. App. 111). Mr. Mauer did not have prior justification for an intrusion in the course of which he came inadvertently across a piece of evidence incriminating Dombrowski. It is clear that his discovery was not "inadvertent". He was searching for further evidence concerning the homicide. Accordingly, the plain view doctrine does not justify his warrantless search and seizures. *Coolidge v. New Hampshire*, 403 U.S. 443, 467-468 (1971).

III.

THIS COURT SHOULD NOT MODIFY WISCONSIN'S EXCLUSIONARY RULE ADOPTED PRIOR TO THE *MAPP* DECISION

A. Issue Should Not Be Considered

Petitioner in his statement of the questions presented poses the question, "4. Does the 'exclusionary rule' serve society's needs?" and indicates that question was not considered by the Court of Appeals (Petitioner's Br. p.

3). Perhaps it should also be added that this issue was never briefed in the Court of Appeals. Nor was this issue presented by the Petitioner to the District Court, Wisconsin Supreme Court or County Court of Fond du Lac County, Wisconsin. It should not be considered by this Court. *Bivens v. Six Unknown Named Agents*, 403 U.S. 388, 397-398 (1971).

B. Wisconsin Exclusionary Rule

Assuming *arguendo* that a modification of the exclusionary rule is considered by this Court, notwithstanding it not being considered by the courts below, on the merits the exclusionary rule should not be modified. When the Petitioner in this case asks this Court to modify the exclusionary rule enunciated in *Mapp v. Ohio*, 367 U.S. 643 (1961), the Petitioner is in reality asking this Court to modify Wisconsin's own exclusionary rule applicable to state criminal cases which was adopted by the Wisconsin Supreme Court prior to the *Mapp* decision.

Wisconsin case law holds that whether a search and seizure are valid is a question of federal constitutional law. *Kluck v. State*, 37 Wis. 2d 378, 386, 155 N.W.2d 26, 29 (1967). If evidence obtained by an illegal search is admitted into evidence and has a prejudicial effect on the defendant's case, then the Fourteenth Amendment due process clause requires that a subsequent conviction be reversed. *Mapp v. Ohio*, 367 U.S. 643 (1961); *Browne v. State*, 24 Wis. 2d 491, 129 N.W. 2d 175, 131 N.W.2d 169 (1964); *Kluck v. State*, 37 Wis. 2d 378, 386, 155 N.W.2d 26, 29 (1967).

The State of Wisconsin adopted the exclusionary rule prior to the *Mapp* decision and has held inadmissible in Wisconsin Courts evidence obtained by illegal search and seizure. *Hoyer v. State*, 180 Wis. 407, 417, 193 N.W. 89,

93 (1923); *Jokosh v. State*, 181 Wis. 160, 163, 193 N.W. 976, 977 (1923); *State v. Kroening*, 274 Wis. 266, 272-276, 79 N.W.2d 810, 814-816 (1954). In *Kluck v. State*, 37 Wis. 2d 378, 386, 155 N.W.2d 26, 29 (1967) Justice Hanley of the Wisconsin Supreme Court stated the purpose of the Wisconsin exclusionary rule as follows:

> "* * * The purpose of exclusion of evidence in violation of the strictures placed upon searches and seizures has for its purpose the protection of privacy. * * *"

This Court has recognized that the role of the Fourth Amendment is to protect against invasions of privacy and to protect the security a man relies upon when he places himself or his property within a constitutionally protected area, be it his home or his office, his hotel room or his automobile. It protects him from unwarranted governmental intrusion. *Warden v. Hayden*, 387 U.S. 294, 305 (1967); *Hoffa v. United States*, 385 U.S. 293, 301 (1966).

Ker v. California, 374 U.S. 23, 34 (1963) authorized "workable rules governing arrests, searches and seizures to meet 'the practical demands of effective criminal investigation and law enforcement' in the States". The opinion of the Court stated:

> "Preliminary to our examination of the search and seizure involved here, it might be helpful for us to indicate what was not decided in *Mapp [v. Ohio*, 367 U.S. 643]. First it must be recognized that the 'principles governing the admissibility of evidence in federal criminal trials have not been restricted . . . to those derived solely from the Constitution. In the exercise of its supervisory authority over the administration of criminal justice in the federal courts . . . this Court has . . . formulated rules of evidence to be

applied in federal criminal prosecutions' . . . *Mapp*, however, established no assumption by this Court of supervisory authority over state courts, . . . and, consequently, it implied no total obliteration of state laws relating to arrests and searches in favor of federal law. *Mapp* sounded no death knell for our federalism; rather, it echoed the sentiment of *Elkins v. United States, supra*, at 221, that 'a healthy federalism depends upon the avoidance of needless conflict between the state and federal courts' by itself urging that '[f]ederal-state cooperation in the solution of crime under constitutional standards will be promoted, if only by recognition of their now mutual obligation to respect *the same fundamental criteria in their approaches*.' 367 U.S., at 658." (Emphasis in *Ker*.) *Id.* at p. 31.

This Court should avoid modifying Wisconsin's exclusionary rule prohibiting the introduction of evidence obtained as a result of an illegal search and seizure.

C. Exclusionary Rule Should Not Be Modified at This Time

The popular rhetoric of Petitioner suggesting the effect of the exclusionary rule to be that a murderer will be a free man[14] must, of course, be balanced against the state's announced intention of retrying Dombrowski if Petitioner does not succeed in this matter. (R. Letter dated 9/1/72 from Mary V. Bowman, Attorney for Cady, to Hon. Myron L. Gordon). Criticisms for this type seek to shift popular blame to the courts from those who were responsible for the unconstitutional conduct.

Legal arguments advanced by Petitioner for modification of the exclusionary rule are primarily drawn from

[14] See Petitioner's Br. p. 40.

two sources. They are: (1) Professor Oaks' law review article, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. Ch. L. Rev. 665 (1970) and (2) Chief Justice Burger's dissent in *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971).

It is claimed that the exclusionary rule has not worked. There is no empirical data to conclusively establish this. Such proof is not found in Professor Oaks' article. His article states that the evidence is not conclusive, although, in pages 678-709 and especially the summary of findings on pages 706-709, it sets forth a good deal of statistical data challenging the effectiveness of the exclusionary rule. For example, he cites a study of arrests and convictions for seizures of property in Cincinnati, Ohio before and after the *Mapp* decision as showing no significant changes in police behavior. In commenting on this analysis the American Bar Association, Section on Criminal Law, Majority Report, to the House of Delegates, 107c, [concerning the exclusionary rule and Senate Bill No. 2657 (92d Congress, 1st Session, as amended)] states:

> "* * * The majority position of the Council is that in actuality there is no way to be certain what precise effect the exclusionary rule has had on police conduct without an extensive examination of at least a representative sample of police actions in connection with particular searches, seizures and arrests. This is so because no notoriety attends *legal* police conduct, and both incidents and the motivation for it go unrecorded. It is probable that very marked, but unmeasured, improvements in police procedures have taken place. For example, there has not come to the attention of the courts since the *Mapp* decision any cases revealing such outlandish police practices as took place in California in the

Irvine and *Cahan* cases, with the exception, perhaps, of the revelation of illegal federal wiretapping practices in the 1960's.

"Indeed, if it is assumed that police intend to be both rational and lawful, and any other assumption is insupportable, then the exclusionary rule must have contributed to more lawful actions by the police, augmented the professionalism of law enforcement officers, and improved the integrity of the judicial process by leeching from it at least some illegally acquired evidence. Furthermore, the overwhelming percentage of pleas and convictions which attend charges provides ample proof that the rule has not stultified either police work or the judicial process. At the same time there is no demonstrated connection between increases in crime rates and the rule. To conclude otherwise requires generalizations about cause and effect in crime rates which are unwarranted without vastly more data and analysis than is now available. For there (sic) reasons, it is our considered view that the exclusionary rule, while no panacea, is, of all the available alternatives, most likely to motivate police conduct in a lawful direction." *Ibid* at p. 9-10.

On February 12, 1973, the American Bar Association's House of Delegates, the policy making body of the nation's lawyers, voted 129 to 114 in support of the Majority Report of the Criminal Law Section, which opposed Senate Bill No. 2657 and also affirmed the American Bar Association's support of the exclusionary rule in State and Federal criminal proceedings.

Proposed modification of the exclusionary rule set forth in Senate Bill No. 2657 differs in only two respects from the American Law Institute's Model Code of Pre-Arraignment Procedure, Proposed Official Draft No. 1, April 10, 1972, which Petitioner urges the court to

adopt. It should be noted that the Minority Report to the American Bar Association House of Delegates, at p. 11, points out that an important element of the proposed bill, not found in the American Law Institute draft, is the right to sue the Federal Government for tort damages for illegal searches and seizures conducted in violation of the Constitution by Federal employees.

Chief Justice Burger in his dissent, in *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971), suggests that an entirely different remedy should be developed by legislative action, *Id.* at p. 422. After suggesting the framework of such a remedy he notes that once the constitutional validity of such a statute is established, it can reasonably be assumed that the states would develop their own remedial systems on the federal model. *Id.* at pp. 422-424. Specifically, Chief Justice Burger warned:

> "Any such legislation should emphasize the interdependence between the waiver of sovereign immunity and the elimination of the judically created exclusionary rule so that if the legislative determination to repudiate the exclusionary rule falls, the entire statutory scheme would fall." *Id.* at p. 423 n. 7.

Chief Justice Burger did not proposed that the Court abandon the suppression doctrine until some meaningful alternative can be developed. *Id.* at p. 420. He counseled:

> "* * * To overrule *Weeks* and *Mapp*, even assuming the Court was not prepared to take that step, could raise yet new problems. Obviously, the public interest would be poorly served if law enforcement officials were suddenly to gain the impression, however erroneous, that all constitutional restraints on police had somehow been removed—that an open season on 'criminals' had been declared. I am

concerned lest some such mistaken impression might be fostered by a flat overruling of the suppression doctrine cases. For years we have relied upon it as the exclusive remedy for unlawful official conduct; in a sense we are in a situation akin to the narcotics addict whose dependence on drugs precludes any drastic or immediate withdrawal of the supposed prop, regardless of how futile its continued use may be."*Id.* at p. 420-421.

Assuming *arguendo* that a modification of the exclusionary rule should occur, such a change should be left to Congress and the state legislatures, which are better equipped to obtain empirical and other data concerning such changes and fashion remedies consistent with national and state experiences. In no event should any modification be made to retroactively apply to the search in this case that occurred over five years ago when the exclusionary rule clearly applied. If there is to be change prospectively, the alternative to be selected for Wisconsin, (which has sought to provide training to its law enforcement personnel through bulletins issued by the state Attorney General's office, as well as vocational and college level training programs), might vary widely from that of another state which lacks such experience.

At this time the Court should not seek, in effect, to modify Wisconsin's exclusionary rule.

CONCLUSION

The decision of the United States Court of Appeals for the Seventh Circuit should be affirmed.

Respectfully submitted,

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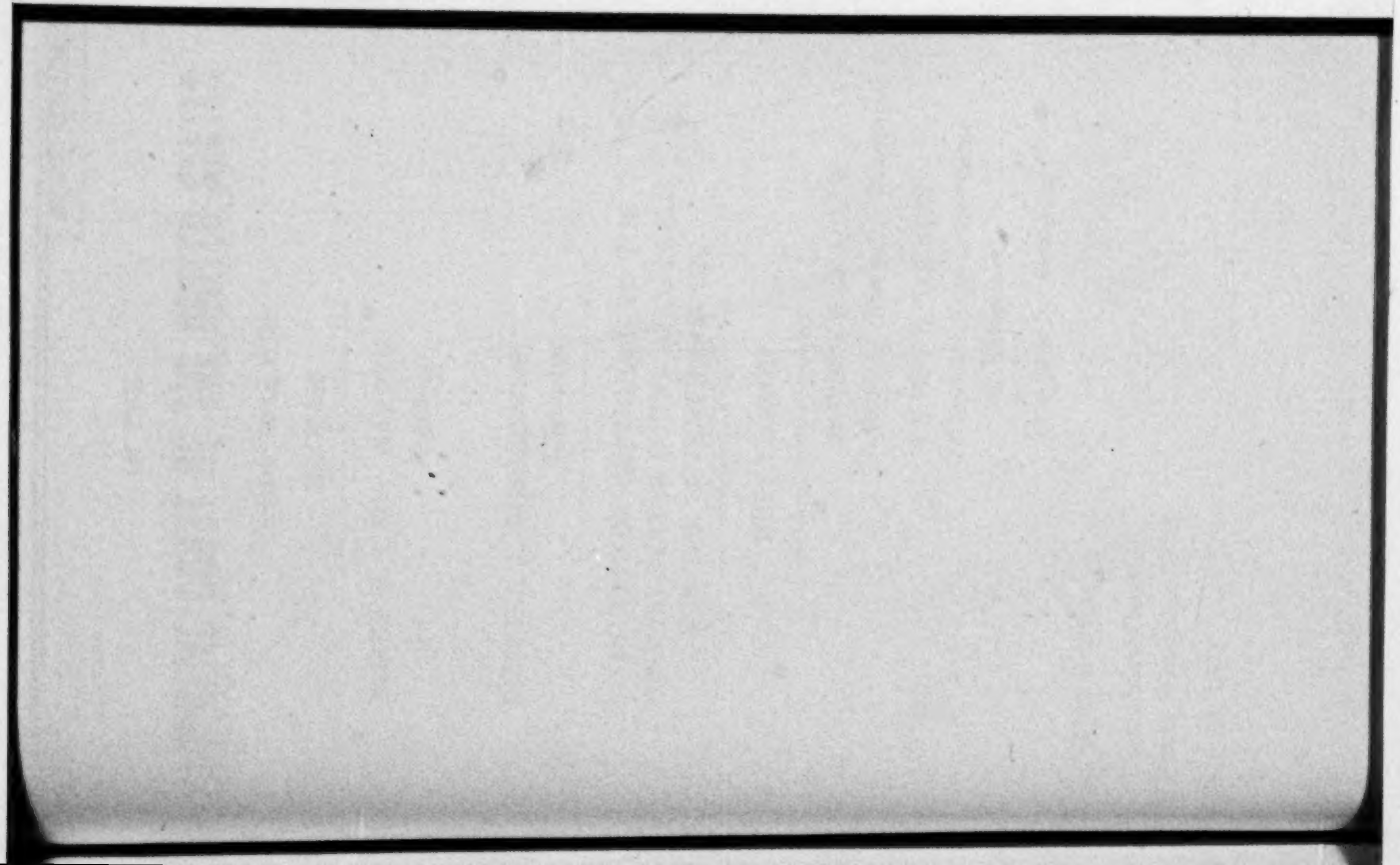

MICHAEL RODAK, JR.,

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1972

No. 72-586

ELMER O. CADY, WARDEN,
Petitioner,

v.

CHESTER J. DOMBROWSKI,
Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

REPLY BRIEF

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March 15, 1973

IN THE

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REPLY BRIEF

ADDENDUM TO THE STATEMENT OF THE CASE

Since the filing of the petitioner's brief in this case there was filed with the Clerk of the Court on February 9, 1973, a supplement to the record on appeal consisting of the following documents:

1. Transcript of proceedings: Conference in chambers, arraignment, motions before Hon. Jerold E. Murphy had on 5/20/68 consisting of 37 pages;

2. Transcript of supplemental testimony offered in support of defense motions had before Hon. Jerold E. Murphy on 6/4/68 consisting of 51 pages; (A. 167)

3. Copy of covering letter to Kenneth J. Carrick from Ruth W. LaFave transmitting Exhibits A, B, C, D, and E with receipt for certified mail attached.

Counsel has been advised by the Clerk of the United States District Court for the Eastern District of Wisconsin that the two transcripts above described were located in the office of the Clerk of the Court of Appeals for the Seventh Circuit in Chicago, Illinois, and the covering letter transmitting Exhibits A, B, C, D, and E to the Clerk of the United States Court of Appeals in Chicago, dated July 21, 1971, was apparently found somewhere in the Clerk's office in Milwaukee.

Had counsel been aware that Exhibits A, B, C, D, and E were actually transmitted to the Court of Appeals in Chicago, of course no reference would have been made to the apparent lack of examination of the trial record by the Court of Appeals. The original record filed with this court, as well as the docket entries in the United States District Court for the Eastern District of Wisconsin did not reveal that Exhibits A, B, C, D, and E had been sent to the Court of Appeals over five months after the original record was sent.

To the extent, therefore, that appellant's brief indicates that the Court of Appeals did not have the benefit of the examination of Exhibits A, B, C, D, and E, such statements or inferences are respectfully withdrawn.

I. Petitioner's Arguments Have Been Consistent.

In section I.A of his argument, respondent scores petitioner for taking allegedly inconsistent positions in the courts below. (Respondent's Brief, pp. 18-19.)

The petitioner has been consistent during the habeas corpus proceedings in the District Court, the Court of Appeals, and this court in the position that the conduct of Officer Weiss was not a search within the meaning of the constitutional provision. The fact that the term "search" has been used interchangeably with the term "inspection" does not change the principal question in regard to Officer Weiss's conduct, and that is whether he conducted an unreasonable search within the meaning of the Fourth Amendment to the United States Constitution. The Wisconsin Supreme Court called Weiss's action an "inspection," *State v. Dombrowski* (1969), 44 Wis. 2d 486, 496, 171 N.W. 2d 349, and the District Court described his action as an "examination" and an "inspection," 319 F. Supp. 532.

The fact that the courts, as well as the three different lawyers who have represented the State of Wisconsin at the various stages of this proceeding, may have used different terminology, is merely confirmation of the proposition that there is not unanimity among the courts and the lawyers in dealing with search and seizure questions. One thing is for certain, however, the State of Wisconsin has taken the position from the very beginning that Officer Weiss's conduct was not a search within the constitutional sense because he did not act with a view to or with intent to discover evidence of any crime.

He was acting solely to protect the property of Mr. Dombrowski. For an excellent discussion on inventory-type "searches" see *United States v. Mitchell* (9th Cir. 1972), 458 F. 2d 960. See also *United States v. Pennington* (5th Cir. 1971), 441 F. 2d 249, cert. den. 404 U.S. 854.

II. Dodge Search Warrant Was Not Returned.

Respondent continues to assert, as he did before the Court of Appeals, that the search warrant was executed on the night of its issuance, was returned before Mauer came across the white sock and the floor mat and, therefore, at the time of Mauer's acts the warrant had already been executed and a return prepared. Notice, however, that no claim is made that the return had been filed, just "prepared." Respondent cites 79 C.J.S., *Searches and Seizures* §83, p. 897, as authority for the proposition that when the warrant has been executed it cannot thereafter serve as a basis for unlimited additional searches.

The same C.J.S. citation, however, supports the proposition that a search may be continuous where it is not abandoned or completed and will not be held void because the officers go over the premises a second time. It is clear from the record in this case that the search was not completed at the farm the night the search warrant was issued because, as a practical matter, it would be foolish to search in the dark when the vehicle was being taken to the sheriff's garage where experts from the Crime Laboratory could assist the sheriff the following morning in a complete search of the vehicle for evidence of murder. The judge's order for impounding, the

sheriff's arrangements with the tow truck operator to remove the vehicle to the sheriff's garage, and the filing stamp on the return showing the return was not made until September 14, 1967, the day after the search in the sheriff's garage (A. 33), all support the proposition that the search was continuous and took place while the warrant was still in effect.

III. Exclusionary Rule Should Be Examined.

Respondent contends that since the Court of Appeals did not consider the exclusionary rule and the issue was never briefed in that court, it should not be considered by this court. *Bivens v. Six Unknown Named Agents* (1971), 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed. 2d 619, is cited as authority for the proposition that where the Court of Appeals has not passed upon an issue this court will not consider the question.

In that case, however, the District Court had ruled that the federal agents were immune from liability by virtue of their official position, but since the Court of Appeals had not ruled on that issue, this court did not consider that particular question.

Here, we are dealing with a rule adopted by this court and only this court can modify the rule.

Respondent's notion that the modification of the exclusionary rule under the Fourth Amendment would modify Wisconsin's exclusionary rule, prohibiting the introduction of evidence obtained as a result of illegal search and seizure in violation of Wisconsin's Constitution, is without merit.

The proposition that each state may have more stringent requirements under its constitutional provisions needs no citation. That the Wisconsin courts would modify their interpretation of the federally imposed exclusionary rule if modifications were made by this court would only appear to be appropriate insofar as their interpretation of the federal constitution is concerned.

Respectfully submitted,

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March 15, 1973

CERTIFICATE OF SERVICE

I, the undersigned, a member of the Bar of this Court, do hereby certify that on March 15, 1973, I duly mailed three copies of the Reply Brief for petitioner to each of the attorneys for respondent, addressed as follows:

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IN THE

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OCTOBER TERM, 1972

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF OF THE STATE OF FLORIDA, AMICUS CURIAE, ON BEHALF OF THE PETITIONER.

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Comes now the State of Florida presenting to this Court a motion for leave to file Brief Amicus Curiae, sponsored by the Attorney General of Florida pursuant to Rule 42(4).

The State of Florida has a substantial interest in the exclusionary rule as interpreted by this Court, other Federal Courts and the State Courts of Florida. Any change in the exclusionary rule as it is now applied would have a severe effect on police procedures in Florida concerning property inventories prior to a lawful impoundment.

The Attorney General of Florida is deeply concerned with the disruptive effects upon the administration of standard police procedures and the extreme position the State of Florida would be placed in by an adverse decision by this Court in reference to the exclusionary rule of evidence.

Therefore, the State of Florida, by and through the Attorney General of Florida, presents this motion for leave to file a delayed Brief Amicus Curiae.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

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BRIEF OF THE STATE OF FLORIDA AS AMICUS CURIAE

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Florida Attorney General
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INTEREST OF THE AMICI

The petitioner for certiorari in the above case raised four questions as follows:

1. Is a police officer engaged in a "search within the meaning of the Fourth Amendment, when, seeking to locate property of a person under arrest for drunk driving, he opens the trunk of the person's disabled vehicle and discovers what later develops to be evidence of a murder of which he had no previous knowledge or suspicion?

   The Court of Appeals held in the affirmative.

2. If the first question is answered in the affirmative, is such a search "unreasonable" within the meaning of the Fourth Amendment?

3. Where a judge issues a written order for the search and an oral order for impounding of a vehicle for evidence of the crime of murder and the vehicle is thereafter seized and removed to a police garage, is evidence obtained in the search the following day admitted at trial in violation of Fourth Amendment rights?

   The Court of Appeals held in the affirmative.

4. Does the "exclusionary rule" serve society's needs?

The Attorney General of Florida is concerned with Questions 1, 2 and 4.

The interest of the Attorney General of the State of Florida in these questions is substantial. As chief legal officer of the State of Florida, the Attorney General is concerned with maintaining a fair balance between effective law enforcement to protect society against crime and the observation of the constitutional safeguards within the foundation of the administration of criminal justice. As counsel to the officers of this State, the Attorney General is concerned with the seriously disruptive effects upon the administration of standard police procedures concerning the inventory of property to be impounded by the State.

Mindful of the precedents that this case may establish with regard to property inventories and the application of the exclusionary rule to evidence obtained during such necessary inventories, the State of Florida presents its position in this brief amici curiae filed with the Court.

QUESTION PRESENTED

Whether the exclusionary rule of evidence as developed and interepreted by the courts prior to the Seventh Circuit Court of Appeal reversal of the case sub judice, adequately served society's needs.

SUMMARY OF ARGUMENT

We oppose the extension of the constitutional restrictions concerning the use of evidence produced during an unreasonable search and seizure to evidence produced during a standard police inventory procedure. The constitutional prohibitions were intended to cover unreasonable searches and seizures. Inasmuch as the standard police procedure of property inventory satisfies the two-fold requirement of protecting the property of the individual and protecting the State from erroneous claims, the procedure is not unreasonable. Being not unreasonable, the inventory procedure does not fall within the Constitutional mandates of the Fourth Amendment.

ARGUMENT

The people of the State of Florida, following closely the Fourth Amendment to the Constitution of the United States, have preserved the right "to be secure in their persons, papers and effects against unreasonable searches and seizures." The organic law of the State of Florida forbids the issue of search warrants "except upon probable cause, supported by affidavit, particularly describing the place or places to be searched, the person or persons, thing or things to be seized . . ." Florida Constitution, Art. I, Sec. 12, 1968.

These expressions of our organic law stem from the principle of the common law securing to every citizen in his home and office immunity from interference by the State and protection of his person, property and papers from legal process.

Justice Glenn Terrell of the Supreme Court of Florida noted:

> Prior to the Revolution, the liberty of the citizen in the colonies was harrassed by writs of assistance in the hands of revenue officers to search designated places for

smuggled goods, persons, and papers. In this country and in England, executive warrants were issued to search private houses to recover books and papers that might be used as evidence against the owner. The practice was the remnant of a jurisprudence that had its roots in prerogative as against democratic power and was often accompanied by ruthless intrusion of governmental agents into private homes and effect to secure evidence for political prosecutions. These writs were exasperating to the citizen, contrary to every democratic impulse and were considered the most flagrant examples of arbitrary power known to the people, hence the language of the Fourth Amendment which was repeated in all the State Constitutions. Church v. State, 9 So. 2d 164, at 166-7 (Fla. 1942).

The purposes of the Fourth Amendment are as vital today as they were when the Amendment was passed by Congress in 1789. These purposes, however are not unlimited. Only "unreasonable" searches and seizures were targeted for legislative and judicial inundation.

When searches and seizures were made within the spirit of the Constitutional mandates, the courts have been diligent in the protection of our precious liberties but have not permitted these very mandates to

shield those engaged in illegal acts. Also, it has been made adequately clear that the protections afforded by the Amendment extends to "those suspected or known to be offenders as well as the innocent . . ." Ker v. California, 374 U.S. 23 at 32, 83 S.Ct. 1623, 10 L.Ed. 2d 726 at 737 (1963).

Two situations have developed generally which require an officer of the law to search an automobile. One is the search authorized by a search warrant issued under the authority of the state statutes. The other is the search made incident to a lawful arrest to secure from destruction or loss evidence for use in the prosecution of the arrested individual and/or to protect the officer from possible dangers from accessible weapons.

There is another situation that has developed from the ever expanding use of the automobile. It has become a burdensome requirement of the law officer to secure and impound automobiles when various situations require, such as the automobile abandoned in traffic, parked in an ambulance route to a hospital, or where the driver has been rendered disabled by illness or alcohol or even drugs and there is no one to take custody otherwise. This taking custody for whatever reason would suggest that the officer is morally and legally responsible for the property of the individual owner. Under such circumstances, there must be a listing

of the property impounded. This requirement satisfies a two-fold problem. It secures the property for the involved individual citizen and also sets forth both a good faith showing by the State that the listed property is secure from theft and at the same time protects the state from wrongful accusations of conversion. See: United States v. Mitchell, 458 F.2d 960 (9th Cir., 1972). Regardless of what procedural title is placed on it, a search must be conducted to make a meaningful inventory of each item and its condition of impoundment.

The case of Roush v. State, 203 So. 2d 632 (Fla. App. 1967), is one example where the inventory procedure is required. The Appellant, Roush, was observed by a Miami Beach policeman to be speeding and driving in an erratic manner. He finally parked after being pursued for some distance. Upon his arrest for reckless driving and driving while under the influence of intoxicating liquor, the appellant told the officer there was $1,200 in cash in the automobile. Further, he told the officer that he was not going to tell where it was and that now it was the concern of the police. He said they "could find it if they wanted to." At the same time, he boasted that they would not be able to find the money.

The appellant's little game backfired. No "money" was found but the

officers discovered a briefcase containing a "valuable" quantity of phenobarbital. The drugs were used as evidence in the appellant's subsequent conviction.

Chief Judge Charles Carroll of the Third District Court of Appeal of Florida noted:

> ...[I]t was a normal and prudent action on the part of the police to search the automobile in order to protect the city as well as the arrested party from the effect of possible loss of money, if in fact it was in his automobile. Discovery of the barbiturates was the result of their search for the money, which the state contends, and we agree, was invited, impliedly if not expressly, by the statements made by the appellant when arrested. 203 So. 2d 632, at 633-4.

The Court treated the search as one based on implied consent. But it should matter little whether there is consent when the owner of the property either refuses consent or is incapable of giving consent where the officer is duty bound to conduct an inventory.

The unavailability of the owner's consent has not been used as a blanket to cover other procedural errors in this sensitive constitutional area of the law. The case of Miller v. State, 137 So. 2d 21 (Fla., 1962), provides

an example of the lengths to which the Florida courts will go to protect the people from unreasonable searches and seizures.

One Miller, on January 28, 1961, was involved in an automobile accident in Clearwater, Florida. Officers found him unconscious and saw in defendant's open glove compartment a large amount of money and adding machine tapes bundled together with paper clips and rubber bands.

Miller was hospitalized and later arrested at the hospital for making an improper turn. His wrecked automobile was impounded. Without a search warrant the officer and his superior went to the impounding garage. There they lifted the floor mat and found another bundle of adding machine tapes plus a number of lottery tickets. The appellant Miller was convicted of possession of lottery tickets on the evidence taken from the automobile.

From the testimony given by the officer, it was readily apparent that the search of the appellant's automobile was more than a mere listing of the content and condition thereof. The officer and his superior were making a search for incriminating evidence in every sense of the word. Their suspicions were hardly a substitute for probable cause.

The court clearly noted that an inventory for articles of value, if made

at all, should have been made prior to impoundment. The act of lifting the floor mat of Miller's impounded automobile, coupled with the officer's suspicion, constituted an unreasonable search and seizure. The court simply would not allow such conduct to be labeled an inventory. Miller was granted a new trial.

In a similar Florida case, sans suspicion, the courts upheld the inventory as not being an unreasonable procedure. The arresting officer in Gagnon v. State, 212 So. 2d 337 (Fla. App., 1968) first observed the appellant's automobile in front of a house which was under prior surveillance. The officer followed the automobile. When several traffic violations were observed, the driver was signaled to the side of the road. The vehicle was parked and locked. The driver was recognized and arrested pursuant to a bench warrant issued for previous traffic violations. When asked, the driver said he had borrowed the automobile. The driver failed to identify the lender and gave a home address which the officer knew was erroneous.

The accumulation of these and other circumstances caused the officer to arrest the appellant. A wrecker was radioed to haul in the automobile. Before it arrived an inventory of the automobile was made. The inventory is a routine police procedure when an automobile is being taken into custody. During the inventory a brown paper sack was discovered. It contained

credit cards used in the commission of crimes of which the appellant was convicted.

The Court, per Judge Pearson, held that the arrest was lawful and the inventory was not an unreasonable search and seizure. The inventory of the automobile and its valuable contents was not the result of any suspicion by the officers but rather a routine police procedure.

As Florida District Court of Appeal Judge McNulty so ably noted:

> "Here, there can be no question but that the search was for 'inventory purposes alone. The officers admitted they were not suspicious of possible incriminating evidence being in the car and if they were suspicious, such suspicion would be without reasonable foundation. Godbee v. State, 224 So. 2d 441 at 443 (Fla. App., 1969).

The officers in Godbee were faced with the following situation: A car belonging to the defendant who they had just arrested was left locked and standing illegally on the sidewalk; the defendant had made good a subsequent escape and there was nothing to indicate that he would soon return; and their duties required that they cause the car to be hauled from the illegal area to a place of protection. They were also duty bound by standard police procedures to inventory the car

and its contents both for the preservation thereof and to insulate themselves and their agent, the impounding garage owner, from possible responsibility in the event of theft or destruction. Judge McNulty felt, and rightly so, that gaining access to the interior of the automobile for such purposes was not an unreasonable search in violation of the constitutional prohibitions.

Since there was no probable cause to support the issuance of a search warrant and since there was no reasonable prospect of consent, waiver, or release from responsibility, the officers had no other way to perform the duty required of them.

In State v. Ruggles, 245 So. 2d 692 (Fla. App., 1971), the appellee was arrested for a traffic violation of a character requiring the posting of bond. Before impounding the appellee's automobile, the police made an inventory search. Two disposable hypodermic syringes and a container of contraband narcotics were found in the automobile. At a hearing on a motion to suppress, the lower court ruled the inventory was an unreasonable search and seizure.

Judge Carroll of the Third District Court of Appeal of Florida reversed the lower court on authority of Gagnon v. State, supra, and Godbee v. State, supra. Ruggles, supra, was followed in State v. Galloway, 266 So. 2d 53 (Fla. App., 1972) which had very

similar factual circumstances. It involved an inventory search of an automobile prior to impoundment after a lawful arrest.

The State of Florida does not request or expect to receive "licenses" for subsequent "fishing expeditions." The "inventory" will not be viewed by our state as either an alternative to a valid search warrant where only such would meet the constitutional requirements of reason or as a carte blanche replacement for probable cause.

At the Federal Court level in the State of Florida the case of United States v. Pennington, 441 F. 2d 249 (5th Cir., 1971) cert. denied 404 U.S. 854, can be observed. In Pennington the appellant was convicted for violating 15 U.S.C.A. §902(e) - interstate transportation of a firearm by a convicted felon.

In the predawn hours of October 18, 1965, two Miami Beach police officers observed an automobile proceeding at a very high rate of speed. They gave pursuit with siren wailing and emergency lights flashing. Some "twenty-five to thirty city blocks" was necessary to stop the appellant during which the chase achieved great speeds. The automobile was a rental car and the appellant could not produce his driver's license and rental contract.

He was arrested for reckless driving. The car was inventoried prior

to impoundment with Pennington still present after his arrest. This is a standard Maimi Beach police procedure.

The District Court denied a motion to suppress evidence in the form of a pistol found during the inventory.

The Fifth Circuit Court of Appeal, per Circuit Judge Coleman, wrote an enlightening, though short, opinion concerning this procedure. The officers had more than enough circumstances to conduct a search incident to a lawful arrest to determine whether the rental car was the same as the one reported stolen. Likewise, the officers could have secured the area immediately surrounding the appellant after his arrest. (Such was not warranted under these particular facts although a weapon was involved.) But the officers did not make either of these claims. They had enough to book the appellant. The subsequent inventory was made for the sole purpose of satisfying their own procedural requirements. The First Circuit Court of Appeal agreed this procedure is correct and the law enforcement agencies of Florida are continuing to use the same procedure statewide.

The reasonableness of any search without a warrant is measured from the subjective standpoint of the searchers and their individual conduct. If the search was reprehensibly based on the desire to hunt for incriminating evidence, then the searchers would be

suiting themselves in the clothes of the colonial revenue agents which prompted our protocongress to write the Fourth Amendment to the Constitution of the United States.

At the operations level this question has arisen and was asked of the Attorney General of Florida pursuant to the Florida Constitution and Florida law. Sheriff R. W. Weitzenfeld of Manatee County, Florida, asked if he could have an inventory made of an automobile after arresting the driver when it was required that the automobile be impounded. He further asked if evidence of crime discovered during such inventory was usable in a subsequent prosecution. The entire opinion letter is included in the appendix. Summarizing, the Attorney General noted that where the vehicle is impounded to protect property, an inventory may be conducted. Contraband found in the course of an inventory is admissible if there is no evidence indicating that the officers conducting the search were motivated by a desire to uncover incriminating material.

CONCLUSION

It can be seen that the State of Florida does not condone the use of an inventory search as an alternative to a search warrant when there is suspicion that the inventory would reveal incriminating material. It is

required that officers conducting an inventory do so with only the best motives. Included in the appendix of this brief are examples of the forms used by law enforcement agencies throughout our state. They show the standard required by the State of the inventory procedure. The twofold requirement is satisfied by the procedures of the various agencies in Florida.

The State of Florida as a friend of this Court respectfully urges that the decision of the United States Court of Appeals for the Seventh Circuit in re Cady v. Dombrowski be reversed.

Respectfully submitted,

ROBERT L. SHEVIN
Attorney General of
the State of Florida

A. S. JOHNSTON
Assistant Attorney
General of the State
of Florida

JAMES H. GILLIS
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THE CAPITOL
Tallahassee, Florida
32304

AMICUS CURIAE

CERTIFICATE OF SERVICE

I, the undersigned member of the bar of this Court, do hereby certify that on the day of April, 1973, I duly mailed by air mail, postage prepaid, three copies of the foregoing Brief Amici Curiae to:

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APP. 1

ROBERT L. SHEVIN
ATTORNEY GENERAL

STATE OF FLORIDA
DEPARTMENT OF LEGAL AFFAIRS
OFFICE OF THE ATTORNEY GENERAL
THE CAPITOL
TALLAHASSEE, FLORIDA 32304

REPRODUCTION COPY

March 5, 1973

073-43

Sheriff R. W. Weitzenfeld
Sheriff of Manatee County
Post Office Box 590
Bradenton, Florida 33505

Re: Impounding automobiles upon the arrest of the operator - conducting inventory of impounded automobiles - legal effect of Attorney General Opinions

Dear Sheriff Weitzenfeld:

You have asked several questions regarding the impounding and inventorying of automobiles upon the arrest of the operator. Your questions are stated as follows:

1. Does a law enforcement officer upon arresting the driver of an automobile have the authority to cause the towing and storage of a defendant's vehicle for safekeeping where there is no other alternative but to tow the vehicle and place it in safekeeping, or leave it beside the road, subject to larceny and vandalism, due to the fact that the driver must be booked into jail?

2. Prior to the pickup and storage of the vehicle, may the officer inventory the vehicle for the protection of the owner, for the protection of the vehicle's operator, for the protection of the tow truck operator, as well as the protection of the arresting officer?

3. Where it is the practice of the law enforcement agency to always inventory each and every vehicle towed in because of being unable to make other disposition of the vehicle and an inventory is conducted and contraband discovered, may the contraband legally be used against the defendant in a court of law?

4. What effect does the Attorney General's opinion have at law?

AS TO QUESTION 1:

Although specific authority to have an automobile towed away has not been expressly provided by statute in Florida, such a practice has been justified, based on the duty of law enforcement officers to protect the property of an arrested suspect where reasonably required by the circumstances. Godbee v. State, 224 So. 2d 441 (2d D.C.A., Fla., 1969), et seq.

Such authority is further indicated by the decisions of federal courts and the courts of other states.

Express recognition of the authority of officers to impound an automobile after arrest is clearly stated in Cotton v. United States, 371 F. 2d 385 (CA 9, 1967). In examining the propriety of police action in impounding the suspect's automobile, the court stated:

> "Cotton having been validly arrested and taken to the police station, the officer would have been derelict in his duty if he had left the car unattended in a dark alley in the middle of the night. The police have as much a duty to protect the property of a suspect as they have to protect the property of the rest of us, and that is what they did in this case by towing the car to the police impound. They also had a duty to keep a record of the property that they had impounded so that it could be returned to the suspect or its owner in due course." (p. 392)

The necessity of having the car towed away would depend upon circumstances such as those you mention, i.e., likelihood of vandalism or larceny which an abandoned car might invite.

Additional authority for seizure of an automobile is provided where there is probable cause to believe that the vehicle is being used in violation of certain state laws. F.S. 562.35 provides for the seizure and forfeiture of vehicles used in violation of the state beverage laws; F.S. 398.24 applies to violation of the uniform narcotic drug law of Florida. F.S. 404.09 authorizes seizure of vehicles being used in violation of Florida's Drug Abuse Law. F.S. 933.19 allows search and seizure of a vehicle used in transporting illegal liquors, drugs or other contraband. All of these sections are governed by the test of probable cause rather than the duty of law enforcement officers to take reasonable steps to protect the property of arrested suspects.

APP. 3

AS TO QUESTION 2:

Authority to inventory the vehicle follows upon the authority to have the vehicle removed. Godbee, supra. Illustrations of the reasonable authority to conduct an inventory are provided in the excerpt from Cotton v. United States, quoted above in the answer to Question 1, and in Heffley v. State, 423 P.,2d 666 (Nev. 1967):

> "The police officer, when there is just cause, has a duty not only to impound a car from a public highway for its own protection, but also to inventory the contents so that they may be safeguarded for the owner. Such practice is deemed necessary to defeat dishonest claims of theft of the car's contents and to protect the temporary storage bailee against false charges." (p. 668)

As with the authority to impound a vehicle, the authority derives from the duty to protect and safeguard the property.

Where circumstances do not require that the vehicle be impounded (and therefore inventoried), F.S. 901.21 might authorize a search of the vehicle incident to a lawful arrest. The Florida Supreme Court has held that F.S. 901.21 allows an incidental search of a vehicle which reasonably ensues after a legal arrest. State v. Gustafson, 258 So. 2d 1 (Fla. 1972).

AS TO QUESTION 3:

The individual is protected by the fourth amendment from unreasonable searches. Thus, where a search is too remote in time and place to have been made as incidental to the arrest, then it will be found to have violated the test of reasonableness under the fourth amendment. Preston v. United States, 376 U.S. 364, 11 L. Ed. 2d 777, 84 S. Ct. 881 (1964). But see Chambers v. Maroney, 399 U.S. 42, 26 L. Ed. 2d 419, 90 S. Ct. 1975 (1970), holding fruits of a noncontemporaneous search admissible. See also Ackles v. State, opinion filed December 12, 1972 (4th D.C.A., Fla. 1972), for a recent statement of the law in Florida with regard to "probable cause" and search as "incident" to a lawful arrest.

APP. 4

A search, in the constitutional sense, however, implies some exploratory investigation. See Fagundes v. United States, 340 F. 2d 673 (1st Cir. 1965). A proper inventory will not include this element of exploratory investigation. Thus, where there is a lawful arrest and where circumstances require an impoundment and subsequent inventory, any contraband found in the course of a routine inventory would be admissible as evidence. An exposition of the rationale behind such admissibility is provided by the Washington Supreme Court in State v. Montague, 438 P. 2d 571 (Wash. 1968):

> "When, however, the facts indicate a lawful arrest, followed by an inventory to or following the impoundment of the car, and there is found to be reasonable and proper justification for such impoundment, and where the search is not made as a general exploratory search for the purpose of finding evidence of crime but is made for the justifiable purpose of finding, listing, and securing from loss, during the arrested person's detention, property belonging to him, then we have no hesitancy in declaring such inventory reasonable and lawful, and evidence of crime will not be suppressed." 438 P. 2d at 574.

Case authority in Florida indicates the apparent view of courts in this state that an inventory is not a search in the constitutional sense of the word, and, consistent with the rationale of the language in the Montague opinion quoted above, Florida courts will admit evidence of crime obtained in a proper inventory search. State v. Galloway, 266 So. 2d 53 (3rd D.C.A., Fla., 1972); Christian v. State, 265 So. 2d 83 (3rd D.C.A., Fla., 1972); State v. Ruggles, 245 So. 2d 692 (3rd D.C.A. Fla., 1971); Godbee v. State, 224 So. 2d 441 (2d D.C.A., Fla., 1969); Knight v. State, 212 So. 2d 900 (3rd D.C.A., Fla., 1968); and State v. Holmes, 256 So. 2d 32 (2d D.C.A., Fla., 1972)(distinguishing an inventory search).

It should be noted, however, that a significant and potentially fatal distinction exists between an inventory search and an exploratory search. See St. Clair v. State, 232 A. 2d 565 (Md. App. 1967); Godbee, supra. See Urquhart v. State, 261 So. 2d 535 (2d D.C.A., Fla., 1971) for an excellent discussion of the jurisprudential aspects of the inventory search theory.

There, in the opinion on rehearing, Judge Mann, District Judge, issued an appropriate warning to law enforcement officials:

> ". . .[A]s an abstract matter of law, what is found . . . should not have any bearing on the determination of the question of whether the police had a right to impound the car and search it. That question is not yet fully explored, and before its clarification is complete some law enforcement officers may be embarrassed if they view the inventory search as a new excuse for not getting a search warrant." Cf. Courington v. State, Fla., 1954, 74 So. 2d 652.

Thus, as indicated by the opinions above, the admissibility of any evidence found is destroyed if the impoundment was unjustified or the search was intended to uncover incriminating evidence. Additionally, where there is reason to suspect contraband, a search may be justified by Fla. Stat. §933.19 (1971) and anything found would be admissible based upon the reasonability of the search without regard to the necessity to impound.

AS TO QUESTION 4:

Your question regarding the effect of Attorney General Opinions is discussed at 3 Fla. Jur., Attorney General, Section 7:

> "Although the opinions of the Attorney General have in no sense the effect of judicial utterances, in actual practice they are usually followed. His opinion, while not binding on the courts, is entitled to weight in construing the Florida statutes. And his official opinions as to the validity or invalidity of a statute are the guides for state executive and administrative officers in performing their official duties until superseded by judicial decisions."

APP. 6

SUMMARY

The impounding of vehicles after the arrest of the operator may be required to protect the property of the suspect. The vehicle may be seized if there is probable cause to believe that it is being used in violation of certain specific statutes.

Where the vehicle is impounded to protect the property, an inventory of the vehicle may be conducted to complete this protection. Additionally, an active search for contraband may be conducted where it is reasonably suspected.

Contraband found in the course of an inventory is admissible if the impoundment and inventory were necessary, and there is no evidence indicating that an intent to uncover incriminating evidence was the motivation for the inventory. Where a search is conducted reasonably incident to an arrest or based upon probable cause to suspect contraband, any contraband found would be likewise admissible.

Attorney General opinions, while not binding on the courts, are entitled to weight in construing Florida statutes and are guides for state executive and administrative officers in performing their official duties until superseded by judicial decisions.

Sincerely yours,

ROBERT L. SHEVIN
Attorney General

Prepared by:

AL S. JOHNSTON
Assistant Attorney General

APP. 7

OTHER DEPT CASE NO

HOMESTEAD POLICE DEPT.
HOMESTEAD, FLORIDA
VEHICLE STORAGE RECEIPT

YEAR	MAKE	BODY TYPE (2 DR CONV ETC.)	LICENSE TAG INFORMATION	YEAR	STATE	NUMBER

MOTOR NUMBER (1964 AND UNDER)

SERIAL NUMBER (1965 AND OVER)

LOCATION VEHICLE TOWED FROM

NAME AND ADDRESS OF GARAGE TAKEN TO

DATE AND TIME TOWED IN	REASON IMPOUNDED	OPERATOR'S NAME	ADDRESS	PHONE

HOLD FOR: (Use only if authorized by unit supervisor affected)

DETECTIVE BUREAU _____ Section ☐
LABORATORY BUREAU ..... ☐
SPECIAL ENFORCEMENT SECTION ..... ☐
OTHER (State Which) _____ ☐

IF HELD FOR LABORATORY BUREAU, INDICATE WHICH SECTION, UNIT, OR INDIVIDUAL REQUESTED PROCESSING.

SECTION	UNIT	INDIVIDUAL

JOINT PROPERTY INVENTORY TAKEN BY OFFICERS AND TOW DRIVER (CHECK APPROPRIATE ITEMS)

RADIO	HEATER	SPARE TIRE	SPOTLIGHT	HUBCAPS	FOGLIGHTS	MIRRORS	REGISTRATION PAPERS

MISCELLANEOUS PROPERTY IN VEHICLE (TOOLS CLOTHES ETC.)

STANDARD PARTS MISSING FROM VEHICLE (WHEELS HEATER LIGHTS GENERATOR ETC.)

DAMAGE TO VEHICLE (DENTED FENDERS BROKEN WINDOWS ETC.)

SIGNATURE OF OWNER AND OR DRIVER IF RELEASED AT SCENE

WE, THE UNDERSIGNED OFFICER(S) AND TOW TRUCK DRIVER(S), HEREBY CERTIFY THAT THE ABOVE LISTED JOINT PROPERTY INVENTORY IS CORRECT TO THE BEST OF OUR KNOWLEDGE.

Signature _____
TOW TRUCK DRIVER

OWNER DRIVER

IMPOUNDING OFFICER(S)

BADGE NO. _____ DEPT. _____

GENERAL INSTRUCTIONS TO GARAGES OF IMPOUNDMENT AND VEHICLE OWNERS

1. As a result of the approval of Resolution No. 2557 by the Dade County Board of County Commissioners on December 16, 1958, no vehicle will be released from your custody except upon presentation of written authority from the Homestead Police Department, 711 N. E. First Road, Homestead, Florida 33030.
2. Vehicle releases may be obtained 24 hours a day, Saturdays, Sundays and holidays included.
3. Vehicle registration and title, or copy of title, must be presented as proof of ownership at time owner applies for release of vehicle. Telephone inquiries may be directed to 247-1535.

HPD-6

VEHICLE STORAGE RECEIPT

APP. 8

OTHER DEPT. CASE NO.

PUBLIC SAFETY DEPARTMENT
DADE COUNTY, FLORIDA
VEHICLE STORAGE RECEIPT

CASE NO.

YEAR	MAKE	BODY TYPE (4-dr., conv., etc.)	LICENSE TAG INFORMATION: YEAR	STATE	NUMBER

MOTOR NUMBER (If no A/C write "none")

SERIAL NUMBER (If none write "none")

LOCATION VEHICLE TOWED FROM

NAME AND ADDRESS OF GARAGE TAKEN TO

DATE AND TIME TOWED IN	REASON IMPOUNDED	OPERATOR'S NAME	ADDRESS	PHONE

HOLD FOR: (Use only if authorized unit supervisor affected)

- ☐ DETECTIVE BUREAU _____ Section
- ☐ LABORATORY BUREAU
- ☐ SPECIAL ENFORCEMENT SECTION
- ☐ OTHER (State Which) _____

IF HELD FOR LABORATORY BUREAU, INDICATE WHICH SECTION, UNIT, OR INDIVIDUAL REQUESTED PROCESSING.

SECTION	UNIT	INDIVIDUAL

JOINT PROPERTY INVENTORY TAKEN BY OFFICERS AND TOW DRIVER (CHECK APPROPRIATE ITEMS)

RADIO	HEATER	SPARE TIRE	SPOTLIGHT	HUBCAPS	FOGLIGHTS	MIRRORS	REGISTRATION PAPERS

MISCELLANEOUS PROPERTY IN VEHICLE (TOOLS, CLOTHES, ETC.)

STANDARD PARTS MISSING FROM VEHICLE (WHEELS, HEATER, LIGHTS, SEPARATORS, ETC.)

DAMAGE TO VEHICLE (DENTED FENDERS, BROKEN WINDOWS, ETC.)

SIGNATURE OF OWNER AND/OR DRIVER IF RELEASED AT SCENE

WE, THE UNDERSIGNED OFFICER(S) AND TOW TRUCK DRIVER(S), HEREBY CERTIFY THAT THE ABOVE LISTED JOINT PROPERTY INVENTORY IS CORRECT TO THE BEST OF OUR KNOWLEDGE.

Signature _____ TOW TRUCK DRIVER

_____ IMPOUNDING OFFICER(S)

_____ RELEASED TO OWNER/DRIVER AT GARAGE

BADGE NO. _____ DEPT. _____

GENERAL INSTRUCTIONS TO GARAGES OF IMPOUNDMENT AND VEHICLE OWNERS

1. As a result of a Modified and amended Resolution No. 11314 and Administrative Order No. 14-69, Dated June 3, 1969, all vehicles without HOLD ORDERS are turned over direct to the garages at date of impoundment and may be released directly by the garage.

2. Vehicles with HOLD ORDERS must have a written authorization of release from the Public Safety Department. Release may be obtained 24 hours per day at:
   a. South District Station, 9800 E. Fava Street, Perrine, 235-7111.
   b. Central District Station, 1320 N. W. 14 Street, Miami, 377-7716.
   c. Port Authority District, Miami International Airport, 633-2696.
   d. North District Station, 16770 N. W. 37th Avenue, 624-8581.

3. A copy of the Vehicle Storage Receipt must be presented to obtain the release or the owner must show Title or Current Registration and proof of identity such as a current drivers license, and/or proof of agency before the vehicle will be released. Telephone inquiries directed to 377-7716 and 377-7741.

THE VEHICLE STORAGE RECEIPT

PROPERTY COPY

114 02 30

APP. 9

OTHER DEPT. CASE NO.

SHERIFF'S DEPARTMENT
BROWARD COUNTY, FLORIDA

VEHICLE STORAGE RECEIPT

CASE NO.

YEAR	MAKE	BODY TYPE (2-dr., conv., etc.)	LICENSE TAG INFORMATION YEAR	STATE	NUMBER

MOTOR NUMBER (Give and verify)

SERIAL NUMBER (Give and verify)

LOCATION VEHICLE TOWED FROM

NAME AND ADDRESS OF GARAGE TAKEN TO

DATE AND TIME TOWED IN	REASON IMPOUNDED	OPERATOR'S NAME	ADDRESS	PHONE

HOLD FOR: (Use only if authorized by unit supervisor affected)

DETECTIVE BUREAU _____ Section ☐
LABORATORY BUREAU ☐
SPECIAL ENFORCEMENT SECTION ☐
OTHER (State Which) _____ ☐

IF HELD FOR LABORATORY BUREAU, INDICATE WHICH SECTION, UNIT, OR INDIVIDUAL REQUESTED PROCESSING.

SECTION UNIT INDIVIDUAL

JOINT PROPERTY INVENTORY TAKEN BY OFFICERS AND TOW DRIVER (Check appropriate items)

RADIO	HEATER	SPARE TIRE	SPOTLIGHT	HUBCAPS	FOGLIGHTS	MIRRORS	REGISTRATION PAPERS

MISCELLANEOUS PROPERTY IN VEHICLE (Tools, clothes, etc.)

STANDARD PARTS MISSING FROM VEHICLE (Wheels, heater, lights, generator, etc.)

DAMAGE TO VEHICLE (Dented fenders, broken windows, etc.)

SIGNATURE OF OWNER AND/OR DRIVER IF RELEASED AT SCENE

WE, THE UNDERSIGNED OFFICER(S) AND TOW TRUCK DRIVER(S), HEREBY CERTIFY THAT THE ABOVE LISTED JOINT PROPERTY INVENTORY IS CORRECT TO THE BEST OF OUR KNOWLEDGE.

Signature _____ TOW TRUCK DRIVER

_____ OWNER/DRIVER

_____ IMPOUNDING OFFICER(S)

BADGE NO. _____ DEPT. _____

GENERAL INSTRUCTIONS TO GARAGES OF IMPOUNDMENT AND VEHICLE OWNERS

1. Authority for release of vehicles may be obtained 24 hours a day from Sheriff's office.
2. Vehicle registration and title, or copy of title, MUST be presented as proof of ownership at time owner applies for release of vehicle. Telephone inquiries may be directed to 525-4321 Ext. 211.

VEHICLE STORAGE RECEIPT

PPD #12

APP. 10

1. PROPERTY CARD No.

SARASOTA COUNTY SHERIFF'S DEPT.
VEHICLE STORAGE RECEIPT

2. CASE No.

3. YEAR | 4. MAKE | 5. BODY TYPE (4 DR., CONV., ETC.) | 6. LICENSE TAG INFORMATION: YEAR | STATE | NUMBER

7. MOTOR NUMBER (TRK AND DRIVE) | 8. SERIAL NUMBER (TRK AND DRIVE)

9. LOCATION VEHICLE TOWED FROM | 10. NAME AND ADDRESS OF GARAGE TAKEN TO

11. DATE AND TIME TOWED IN | 12. REASON IMPOUNDED | 13. OPERATOR'S NAME | ADDRESS | PHONE

14. HOLD FOR: (Use only if authorized by unit supervisor affected)
DETECTIVE BUREAU _____ Section ☐
CRIME LABORATORY ☐
CRIME SCENE TECH. ☐
OTHER (State Which) _____ ☐

15. SPECIAL INSTRUCTIONS:

16. JOINT PROPERTY INVENTORY TAKEN BY OFFICERS AND TOW DRIVER (CHECK APPROPRIATE ITEMS)

RADIO	HEATER	SPARE TIRE	BUMPERS	HUBCAPS	WINDOWS	AIR COND.	REGISTRATION PAPERS

17. MISCELLANEOUS PROPERTY IN VEHICLE (TOOLS, CLOTHING, ETC.)

18. STANDARD PARTS MISSING FROM VEHICLE (WHEELS, HEATER, LIGHTS, GENERATOR, ETC.)

19. DAMAGE TO VEHICLE (DENTED FENDERS, BROKEN WINDOWS, ETC.)

20. SIGNATURE OF OWNER AND/OR DRIVER IF RELEASED AT SCENE

21. WE, THE UNDERSIGNED DEPUTY(S) AND TOW TRUCK DRIVER(S), HEREBY CERTIFY THAT THE ABOVE LISTED JOINT PROPERTY INVENTORY IS CORRECT TO THE BEST OF OUR KNOWLEDGE.

Signature _____ TOW TRUCK DRIVER | IMPOUNDING DEPUTY(S)

OWNER/DRIVER | I.D. NO. _____ DEPT. _____

GENERAL INSTRUCTIONS TO GARAGES OF IMPOUNDMENT AND VEHICLE OWNERS

NOTE: Vehicle registration or title, or copy of title, must be presented as proof of ownership at time the owner applies for release of vehicle. Telephone inquiries may be directed to:

SARASOTA COUNTY SHERIFF'S DEPT

VEHICLE STORAGE RECEIPT

APP. 11

OTHER DEPT. CASE NO.

TALLAHASSEE POLICE DEPARTMENT VEHICLE STORAGE RECEIPT

CASE NO.

YEAR	MAKE	BODY TYPE (2-DR., CONV., ETC.)	LICENSE TAG INFORMATION	YEAR	STATE	NUMBER

MOTOR NUMBER (ITEM 4) AND MAKE | SERIAL NUMBER (ITEM 5) AND MAKE

LOCATION VEHICLE TOWED FROM | NAME AND ADDRESS OF GARAGE TAKEN TO

DATE AND TIME TOWED IN	REASON IMPOUNDED	OPERATOR'S NAME	ADDRESS	PHONE

HOLD FOR:

DETECTIVE BUREAU _____ Section ☐
LABORATORY BUREAU ..... ☐
SPECIAL ENFORCEMENT SECTION ..... ☐
OTHER (State Which) _____ ☐

IF HELD FOR LABORATORY BUREAU, INDICATE WHICH SECTION, UNIT, OR INDIVIDUAL REQUESTED PROCESSING.

SECTION | UNIT | INDIVIDUAL

JOINT PROPERTY INVENTORY TAKEN BY OFFICERS AND TOW DRIVER (CHECK APPROPRIATE ITEMS)

RADIO	HEATER	SPARE TIRE	SPOTLIGHT	HUBCAPS	FOGLIGHTS	WINDOWS	REGISTRATION PAPERS

MISCELLANEOUS PROPERTY IN VEHICLE (TOOLS, CLOTHES, ETC.)

STANDARD PARTS MISSING FROM VEHICLE (SHIELD, HEATER, LIGHTS, GENERATOR, ETC.)

DAMAGE TO VEHICLE (DENTED FENDERS, BROKEN WINDOWS, ETC.)

SIGNATURE OF OWNER AND/OR DRIVER IF RELEASED AT SCENE

WE, THE UNDERSIGNED OFFICER(S) AND TOW TRUCK DRIVER(S), HEREBY CERTIFY THAT THE ABOVE LISTED JOINT PROPERTY INVENTORY IS CORRECT TO THE BEST OF OUR KNOWLEDGE.

Signature _____ TOW TRUCK DRIVER

_____ OWNER/DRIVER

_____ IMPOUNDING OFFICER(S)

BADGE NO. _____ DEPT. _____

GENERAL INSTRUCTIONS REGARDING IMPOUNDMENT OF VEHICLES

1. This form will be used to record, identify and receipt all motor vehicles impounded.
2. Vehicles previously reported stolen inside the City limits and recorded on CRIME AGAINST PROPERTY REPORT, will require this form only to indicate recovery.
3. This form will be used to impound Abandoned Autos and vehicles stolen outside the City Limits and not previously reported to this Department.

DISPOSITION	RECEIVED	RELEASED	STORAGE			
ME	●	●	●			
FWHS	●	●	●			

APP. 12

SARASOTA COUNTY SHERIFF'S DEPT.

PROPERTY RECEIPT

1. ☐ PROPERTY OF DECEASED (PROBATE) 2. ☐ FOUND PROPERTY
☐ TRIAL ☐ LABORATORY EVIDENCE ☐ STOLEN-RECOVERED

3. CASE NO.	4. DATE-TIME FOUND	5. STORED	6. BIN NO.	PROPERTY CARD NO.

7. ADDRESS WHERE PROPERTY IMPOUNDED (Give exact location where property was located)

8. DISCOVERED BY (Name)	ADDRESS	PHONE NO.
9. OWNER'S NAME	ADDRESS	PHONE NO.

10. ITEM NO.	11. QUANTITY	12. VALUE	13. DESCRIPTION
		TOTAL	

I hereby acknowledge that the above list represents all property taken from my possession and that I have received a copy of this receipt.

14. SIGNATURE

15. RECEIVED BY

16. RECEIVED BY

I hereby acknowledge that the above list represents all property impounded by me in the official performance of duty as a Deputy Sheriff.

DIVISION _____ I.D. NO. _____

18. IMPOUNDING OFFICER

19. REASON 21. DATE AND TIME RECEIVED

20. REASON 22. DATE AND TIME RECEIVED

APP. 13

HOMESTEAD POLICE DEPARTMENT

DADE COUNTY, FLORIDA

PROPERTY RECEIPT

HPD-9

☐ PROPERTY OF DECEASED (PROBATE) ☐ FOUND PROPERTY 78.

☐ TRIAL ☐ LABORATORY EVIDENCE ☐ STOLEN-RECOVERED

2. CASE NO.	79. DATE-TIME IMPOUNDED	75 VAULT NO.	BIN NO.	INVENTORY NO.

77. ADDRESS WHERE PROPERTY IMPOUNDED (Give exact location where property was located).

16. DISCOVERED BY (Name)	ADDRESS	PHONE NO.

69. OWNER'S NAME	ADDRESS	PHONE NO.

80. ITEM NO.	81. QUANTITY	82. DESCRIPTION

I hereby acknowledge that the above list represents all property taken from my possession and that I have received a copy of this receipt.

11. SIGNATURE (X)

I hereby acknowledge that the above list represents all property impounded by me in the official performance of duty as a Deputy Sheriff.

DISTRICT OR DIVISION_____ BADGE NO._____

IMPOUNDING OFFICER (X)

14. RECEIVED BY	REASON	DATE AND TIME RECEIVED

RECEIVED BY	REASON	DATE AND TIME RECEIVED

APP. 14

TALLAHASSEE POLICE DEPT.

DEPT. CASE NO

RECEIPT FOR PROPERTY ☐ EVIDENCE ☐

TPD CASE NO.

BIN NO | TYPE OF CASE | ADDRESS WHERE PROPERTY IMPOUNDED

REASON FOR IMPOUNDMENT | DATE AND TIME IMPOUNDED

ITEM NO	QUANTITY	DESCRIPTION

I hereby acknowledge that the above list represents all property taken from my possession and that I have received a copy of this receipt.

SIGNATURE

X

I hereby acknowledge that the above list represents all property impounded by me in the official performance of duty as a City Police Officer.

IMPOUNDING OFFICER | I.D. NO. | DIVISION

X

RECEIVED BY	REASON	DATE AND TIME RECEIVED
RECEIVED BY	REASON	DATE AND TIME RECEIVED
RECEIVED BY	REASON	DATE AND TIME RECEIVED
RECEIVED BY	REASON	DATE AND TIME RECEIVED
RECEIVED BY	REASON	DATE AND TIME RECEIVED
RECEIVED BY	REASON	DATE AND TIME RECEIVED
RECEIVED BY	REASON	DATE AND TIME RECEIVED
FINAL DISPOSITION	AUTHORITY	DATE AND TIME OF DISPOSITION

APP. 15

PUBLIC SAFETY DEPT.
DADE COUNTY, FLORIDA

PROPERTY RECEIPT

☐ PROPERTY OF DECEASED (PROBATE) ☐ FOUND PROPERTY 78.
☐ TRIAL ☐ LABORATORY EVIDENCE ☐ STOLEN-RECOVERED

CASE NO.	79. DATE - TIME IMPOUNDED	75. VAULT NO.	BIN NO.	INVENTORY NO
ADDRESS WHERE PROPERTY IMPOUNDED (Give exact location where property was located).				76. TYPE OF CASE
DISCOVERED BY (Name)	ADDRESS			PHONE NO.
OWNER (NAME)	ADDRESS			PHONE NO.

ITEM NO.	81. QUANTITY	82. DESCRIPTION

I hereby acknowledge that the above list represents all property taken from my possession and that I have received a copy of this receipt.

SIGNATURE (X)

I hereby acknowledge that the above list represents all property impounded by me in the official performance of duty as a Deputy Sheriff.

DISTRICT OR DIVISION _____ BADGE NO. _____

IMPOUNDING OFFICER (X)

RECEIVED BY (Print on back)	REASON	DATE AND TIME RECEIVED
RECEIVED BY	REASON	DATE AND TIME RECEIVED
RECEIVED BY	REASON	DATE AND TIME RECEIVED
RECEIVED BY	REASON	DATE AND TIME RECEIVED
RECEIVED BY	REASON	DATE AND TIME RECEIVED
RECEIVED BY	REASON	DATE AND TIME RECEIVED

(REV. 10/72)

APP. 16

SHERIFF'S DEPARTMENT
BROWARD COUNTY, FLORIDA

PROPERTY RECEI

70. ☐ PROPERTY OF DECEASED	☐ TRIAL	☐ FOUND PROPERTY	☐ LABORATORY (ATTACH SIGNED)	☐ STOLEN - RECOVERED
2. CASE NO.	79. DATE - TIME RECEIVED	8H. ARREST NO.	76. TYPE OF CASE	

77. ADDRESS WHERE PROPERTY IMPOUNDED (GIVE EXACT LOCATION WHERE FOUND)

16. FOUND BY	ADDRESS	PHONE NO.
31. SUSPECT(S) (GIVE FULL NAME)	ADDRESS	PHONE NO.
14. VICTIM	ADDRESS	PHONE NO.
48. OWNER'S NAME	ADDRESS	PHONE NO.

80. ITEM NO.	81. QTY.	82. DESCRIPTION

83. I HEREBY ACKNOWLEDGE THAT THE ABOVE LIST REPRESENTS ALL PROPERTY TAKEN FROM MY POSSESSION AND THAT I HAVE RECEIVED A COPY OF THIS RECEIPT.

SIGNATURE (X) _____

28. I HEREBY ACKNOWLEDGE THAT THE ABOVE LIST REPRESENTS ALL PROPERTY IMPOUNDED BY ME IN THE OFFICIAL PERFORMANCE OF MY DUTY AS A DEPUTY SHERIFF.

DIVISION _____ BADGE NO. _____

IMPOUNDING OFFICER (X) _____

84. RECEIVED BY	REASON	DATE AND TIME RECEIVED

BSO - ABC - NO. 11

LEON COUNTY SHERIFFS DEPARTMENT

INVENTORY RECORD OF SEIZED VEHICLE AND PROPERTY

Case No. _____

Where seized _____ Date seized _____

Seized from: _____

Participating Officers: _____

Seized for violation of: _____

_____

Make: _____ Body Style: _____ Year _____

Serial No. _____ Engine No. _____ No. of Cylinders _____

License Tag No. _____ Year _____ State _____

General Condition of Vehicle? _____ Estimated Value _____

Does it have?

Radio _____ Make _____ Serial No. _____

Heater _____ Air Conditioning _____ Spare tire _____

List any other accessories or equipment which are worth more than five dollars ($5.00) ____

_____

_____

_____

List any other property seized in connection with this case, such as raw materials, still apparatus, etc. _____

_____

_____

RECEIVED THE PROPERTY DESCRIBED ABOVE ON THE

_____ DAY OF _____ A. D. 19 _____

For the Board of County Commissioners
of Leon County

_____
Authorized Agent for Board of County Commissioners

WITNESS:

_____
Reporting Officer

_____
Title

Car is located at _____

APP. 10

ORLANDO POLICE DEPARTMENT	VEHICLE STORAGE REPORT AND INVENTORY	Complaint No.

REASON FOR IMPOUNDMENT:

Stolen: _____
Abandoned or Junker _____
Involved in Accident _____
Traffic Hazard _____
Owner/Driver Arrested _____
Involved in other offense: Explain

DATE: TIME:
TOWED FROM: (location)
LOCATION OF KEYS:
DESCRIBE VEHICLE: Make Model Yr.
Color
Tag No. State/Expires
Motor or I.D. No.
Damage (if any, location)

Summons No.	Parking Ticket No.	A.I. Report No.

Arrest Report No. Offense Report No.

Other Report (Explain) Number

Registered Owner or Driver (Circle one)

Name and Address

VEHICLE ON HOLD FOR FURTHER INVESTIGATION: YES____ NO____

ASSISTANCE REQUESTED FROM: (CIB, Ident., or whom)

RELEASE UPON PROOF OF OWNERSHIP: YES____ NO____

TOW TICKET NUMBER: STORAGE GARAGE:

WRECKER DRIVER'S SIGNATURE:

RELEASED BY: TIME DATE

RELEASED TO: PRINT NAME AND ADDRESS:

Signature of party to whom released:

REMARKS: Use only to explain above. INVENTORY MUST BE LISTED ON REVERSE SIDE

VEHICLE INVENTORY LISTED ON REVERSE: YES____ NO____

PROPERTY REMOVED FROM VEHICLE AND PLACED IN STORAGE: YES____ NO____

REASON: Evidence _____
Contraband _____
Valuable _____
Perishable _____
Other _____

PROPERTY RECEIPT NUMBER:

Officers Signature Number

Supervisor

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U.S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

CADY, WARDEN *v.* DOMBROWSKI

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 72–586. Argued March 21, 1973—Decided June 21, 1973

Respondent had a one-car accident near a small Wisconsin town, while driving a rented Ford. The police had the car towed to a garage seven miles from the police station, where it was left unguarded outside. Respondent was arrested for drunken driving. Early the next day, an officer, looking for a service revolver which respondent (who had identified himself as a Chicago policeman) was thought to possess, made a warrantless search of the car and found in the trunk several items, some bloodied, which he removed. Later, on receipt of additional information emanating from respondent, a blood-stained body was located on respondent's brother's farm in a nearby county. Thereafter, through the windows of a disabled Dodge which respondent had left on the farm before renting the Ford, an officer observed other bloodied items. Following issuance of a search warrant, materials were taken from the Dodge, two of which (a sock and floor mat) were not listed in the return on the warrant among the items seized. Respondent's trial for murder, at which items seized from the cars were introduced in evidence, resulted in conviction which was upheld on appeal. In this habeas corpus action, the Court of Appeals reversed the District Court and held that certain evidence at the trial had been unconstitutionally seized. *Held:*

1. The warrantless search of the Ford did not violate the Fourth Amendment as made applicable to the States by the Fourteenth. The search was not unreasonable since the police had exercised a form of custody of the car, which constituted a hazard on the highway, and the disposition of which by respondent was precluded by his intoxicated and later comatose condition; and the revolver search was standard police procedure to protect the public from a weapon's possibly falling into improper hands. *Preston* v. *United States*, 376 U. S. 354, distinguished; *Harris* v. *United States*, 390 U. S. 234, followed. Pp. 6–15.

Syllabus

2. The seizure of the sock and floor mat from the Dodge was not invalid, since the Dodge, the item "particularly described," was the subject of a proper search warrant. It is not constitutionally significant that the sock and mat were not listed in the warrant's return, which (contrary to the assumption of the Court of Appeals) was not filed prior to the search, and the warrant was thus validly outstanding at the time the articles were discovered. Pp. 15–16.

— F. 2d —, reversed.

REHNQUIST, J., wrote the opinion of the Court, in which BURGER, C. J., and WHITE, BLACKMUN, and POWELL, JJ., joined. BRENNAN, J., filed a dissenting opinion, in which DOUGLAS, STEWART, and MARSHALL, JJ., joined.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 72-586

Elmer O. Cady, Warden, Petitioner, *v.* Chester J. Dombrowski. | On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

[June 21, 1973]

Opinion of the Court by MR. JUSTICE REHNQUIST, announced by MR. JUSTICE BLACKMUN.

Respondent Charles Dombrowski was convicted in a Wisconsin state court of first degree murder of Herbert McKinney and sentenced to life imprisonment. The conviction was upheld on appeal, *State* v. *Dombrowski*, 44 Wis. 2d 486 (1969), the Wisconsin Supreme Court rejecting respondent's contention that certain evidence admitted at the trial had been unconstitutionally seized. Respondent then filed a petition for a writ of habeas corpus in federal district court, asserting the same constitutional claim. The District Court denied the petition but the United States Court of Appeals for the Seventh Circuit reversed, holding that one of the searches was unconstitutional under *Preston* v. *United States*, 376 U. S. 354 (1964), and the other unconstitutional for unrelated reasons. We granted certiorari, 409 U. S. 1059 (1972).

I

On September 9, 1969, respondent was a member of the Chicago, Illinois, police force and either owned or possessed a 1960 Dodge automobile. That day he drove from Chicago to West Bend, Wisconsin, the county seat of Washington County located some hundred-odd miles

northwest of Chicago. He was identified as having been in two taverns in the small town of Kewaskum, Wisconsin, seven miles north of West Bend, during the late evening of September 9th and the early morning of September 10th. At some time before noon on the 10th, respondent's automobile became disabled, and he had it towed to a farm owned by his brother in Fond du Lac County, which adjoins Washington County on the north. He then drove back to Chicago early that afternoon with his brother in the latter's car.

Just before midnight of the same day, respondent rented a maroon 1967 Ford Thunderbird at O'Hare Field outside of Chicago, and apparently drove back to Wisconsin early the next morning. A tenant on his brother's farm saw a car answering the description of the rented car pull alongside the disabled 1960 Dodge at approximately 4 a. m. At approximately 9:30 a. m. on September 11th, respondent purchased two towels, one light brown and the other blue, from a department store in Kewaskum.

From 7 to 10:15 p. m. of the 11th respondent was in a steak house or tavern in West Bend. He ate dinner and also drank, apparently quite heavily. He left the tavern and drove the 1967 Thunderbird in a direction away from West Bend toward his brother's farm. On the way, respondent had an accident, with the Thunderbird breaking through a guard rail and crashing into a bridge abutment. A passing motorist drove him into Kewaskum, and, after being let off in Kewaskum, respondent telephoned the police. Two police officers picked him up at a tavern and drove to the scene of the accident. On the way, the officers noticed that respondent appeared to be drunk; he offered three conflicting versions of how the accident occurred.

At the scene, the police observed the 1967 Thunderbird and took various measurements relevant to the

accident. Respondent was, in the opinion of the officers, drunk. He had informed them that he was a Chicago police officer. The Wisconsin policemen believed that Chicago police officers were required by regulation to carry their service revolvers at all times. After calling a towtruck to remove the disabled Thunderbird, and not finding the revolver on respondent's person, one of the officers looked into the front seat and glove compartment of that car for respondent's service revolver. No revolver was found. The wrecker arrived and the Thunderbird was towed to a privately owned service station in Kewaskum, approximately seven miles from the West Bend police station. It was left outside by the wrecker, and no police guard was posted. At 11:33 p. m. on the 11th respondent was taken directly to the West Bend police station from the accident scene, and, after being interviewed by an assistant district attorney, to whom respondent again stated he was a Chicago policeman, respondent was formally arrested for drunken driving. Respondent was "in a drunken condition" and "incoherent at times." Because of his injuries sustained in the accident, the same two officers took respondent to a local hospital. He lapsed into an unexplained coma, and a doctor, fearing the possibility of complications, had respondent hospitalized overnight for observation. One of the policemen remained at the hospital as a guard, and the other, Officer Weiss, drove at some time after 2 a. m. on the 12th to the garage to which the 1967 Thunderbird had been towed after the accident.

The purpose for going to the Thunderbird, as developed on the motion to suppress, was to look for respondent's service revolver. Weiss testified that respondent did not have a revolver when he was arrested, and that the West Bend authorities were under the impression that Chicago police officers were required to carry their service revolvers at all times. He stated that the effort

to find the revolver was "standard procedure in our department."

Weiss opened the door of the Thunderbird and found, on the floor of the car, a book of Chicago police regulations and, between the two front seats, a flashlight which appeared to have "a few spots of blood on it." He then opened the trunk of the car, which had been locked, and saw various items covered with what was later determined to be type O blood. These included a pair of police uniform trousers, a pair of gray trousers, a nightstick with the name "Dombrowski" stamped on it, a raincoat, a portion of a car floor mat, and a towel. The blood on the car mat was moist. The officer removed these items to the police station.

When, later that day, respondent was confronted with the condition of the items discovered in the trunk, he requested the presence of counsel before making any statement. After conferring with respondent, a lawyer told the police that respondent "authorized me to state he believed there was a body lying near the family picnic area at the north end of his brother's farm."

Fond du Lac County police went to the farm and found, in a dump, the body of a male, later identified as the decedent McKinney, clad only in a sportshirt. The deceased's head was bloody; a white sock was found near the body. In observing the area, one officer looked through the window of the disabled 1960 Dodge, located not far from where the body was found, and saw a pillowcase, backseat, and briefcase covered with blood. Police officials obtained, on the evening of the 12th, returnable within 48 hours, warrants to search the 1960 Dodge and the 1967 Thunderbird, as well as orders to impound both automobiles. The 1960 Dodge was examined at the farm on the 12th and then towed to the police garage where it was held as evidence. On the 13th, criminolo-

gists came from the Wisconsin Crime Laboratory in Madison and searched the Dodge; they seized the back and front seats, a white sock covered with blood, a part of a bloody rear floor mat, a briefcase, and a front floor mat. A return of the search warrant was filed in the county court on the 14th, but it did not recite that the sock and floor mat had been seized. At a hearing held on the 14th, the sheriff who executed the warrant did not specifically state that these two items had been seized.

At the trial, the State introduced testimony tending to establish that the deceased was first hit over the head and then shot with a .38 caliber gun, dying approximately an hour after the gunshot wound was inflicted; that death occurred at approximately 7 a. m. on the 11th, with a six hour margin of error either way; that respondent owned two .38 caliber guns; that respondent had type A blood; that the deceased had type O blood and that the blood stains found in the 1960 Dodge and on the items found in the two cars were type O.

The prosecution introduced the nightstick discovered in the 1967 Thunderbird and testimony that it had traces of type O blood on it; the portion of the floor mat found in the 1967 car with testimony that it matched the portion of the floor mat found in the 1960 Dodge; the bloody towel found in the 1967 car with testimony that it was identical to one of the towels purchased by respondent on the 11th; the police uniform trousers; the sock found in the 1960 Dodge with testimony that it was identical in composition and stitching to that found near the body of the deceased.

The State's case was based wholly on circumstantial evidence. The Supreme Court of Wisconsin, in reviewing the conviction on direct appeal, stated that "even though the evidence that led to his conviction was cir-

cumstantial, we have seldom seen a stronger collection of such evidence assembled as presented by the prosecution." *State* v. *Dombrowski*, 44 Wis., at 507.

II

The Fourth Amendment provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The ultimate standard set forth in the Fourth Amendment is reasonableness. In construing this command, there has been general agreement that "except in certain carefully defined classes of cases, a search of private property without proper consent is 'unreasonable' unless it has been authorized by a valid search warrant." *Camara* v. *Municipal Court*, 387 U. S. 523, 528–529 (1967). See *Coolidge* v. *New Hampshire*, 403 U. S. 443, 454–455 (1971). One of the class of cases which constitutes at least a partial exception to this general rule is automobile searches. Although vehicles are "effects" within the meaning of the Fourth Amendment, "for purposes of the Fourth Amendment there is a constitutional difference between houses and cars." *Chambers* v. *Maroney*, 399 U. S. 42, 52 (1970). See *Carroll* v. *United States*, 267 U. S. 132, 153–154 (1925). In *Cooper* v. *California*, 387 U. S. 58, 59 (1967), the identical proposition was stated in different language:

> "We made it clear in *Preston* that whether a search and seizure is unreasonable within the meaning of the Fourth Amendment depends upon the facts and circumstances of each case and pointed

> out, in particular, that searches of cars that are constantly movable may make the search of a car without a warrant a reasonable one although the results might be the opposite in a search of a home, a store, or other fixed piece of property. 376 U. S., at 366–367."

While these general principles are easily stated, the decisions of this Court dealing with the constitutionality of warrantless searches, especially when those searches are of vehicles, suggest that this branch of the law is something less than a seamless web.

Since this Court's decision in *Mapp* v. *Ohio*, 367 U. S. 643 (1961), which overruled *Wolf* v. *Colorado*, 338 U. S. 25 (1949), and held that the provisions of the Fourth Amendment were applicable to the States through the Due Process Clause of the Fourteenth Amendment, the application of Fourth Amendment standards, originally intended to restrict only the Federal Government, to the States presents some difficulty when searches of automobiles are involved. The contact with vehicles by federal law enforcement officers usually, if not always, involves the detection or investigation of crimes unrelated to the operation of a vehicle. Cases such as *Carroll* v. *United States*, *supra*, and *Brinegar* v. *United States*, 338 U. S. 160 (1949), illustrate the typical situations in which federal officials come into contact with and search vehicles. In both cases, members of a special federal unit charged with enforcing a particular federal criminal statute stopped and searched a vehicle when they had probable cause to believe that the operator was violating that statute.

As a result of our federal system of government, however, state and local police officers, unlike federal officers, have much more contact with vehicles for reasons related to the operation of vehicles themselves. All States require vehicles to be registered and operators

to be licensed. State and localities have enacted extensive and detailed codes regulating the condition and manner in which motor vehicles may be operated on public streets and highways.

Because of the extensive regulation of motor vehicles and traffic, and also because of the frequency with which a vehicle can become disabled or involved in an accident on public highways, the extent of police-citizen contact involving automobiles will be substantially greater than police-citizen contact in a home or office. Some such contacts will occur because the officer may believe the operator has violated a criminal statute, but many more will not be of that nature. Local police officers, unlike federal officers, frequently investigate vehicle accidents in which there is no claim of criminal liability and engage in what, for want of a better term, may be described as community caretaking functions, totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute.

Although the original justification advanced for treating automobiles differently from houses, insofar as warrantless searches of automobiles by federal officers was concerned, was the vagrant and mobile nature of the former, *Carroll* v. *United States, supra; Brinegar* v. *United States, supra;* cf. *Coolidge* v. *New Hampshire, supra; Chambers* v. *Maroney, supra,* warrantless searches of vehicles by state officers have been sustained in cases in which the possibilities of the vehicle being removed or evidence in it destroyed were remote, if not nonexistent. See *Harris* v. *United States,* 390 U. S. 234 (1968) (District of Columbia police); *Cooper* v. *California,* 386 U. S. 58 (1967). The constitutional difference between searches of and seizures from houses and similar structures and from vehicles stems both from the ambulatory character of the latter as well as from the fact that the extensive, and often noncriminal con-

tact with automobiles that will bring local officials in "plain view" of evidence, fruits, or instrumentalities of a crime, or contraband. Cf. *United States* v. *Biswell*, 406 U. S. 313 (1972).

Here we must decide whether a "search" * of the trunk of the 1967 Ford was unreasonable solely because the local officer had not previously obtained a warrant. And, if that be answered in the negative, we must then determine whether the warrantless search was unreasonable within the meaning of the Fourth and Fourteenth Amendments. In answering these questions, two factual considerations deserve emphasis. First, the police had exercised a form of custody or control over the 1967 Thunderbird. Respondent's vehicle was disabled as a result of the accident, and constituted a nuisance along the highway. Respondent, being intoxicated (and later comatose), could not make arrangements to have the vehicle towed and stored. At the direction of the police, and for elemental reasons of safety, the automobile was

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*Petitioner argued before this Court that unlocking the trunk of the Ford did not constitute a "search" within the meaning of the Fourth Amendment. The thesis is that only an intrusion, into an area in which an individual has a reasonable expectation of privacy, with the specific intent of discovering evidence of a crime constitutes a search. Compare *Haerr* v. *United States*, 240 F. 2d 533 (CA5 1957), with *District of Columbia* v. *Little*, — U. S. App. D. C. —, 178 F. 2d 13 (1949), aff'd on other grounds, 339 U. S. 1 (1950). But see *Camara* v. *Municipal Court*, 387 U. S. 523 (1967). Arguing that the officer's conduct constituted an "inspection" rather than a "search," petitioner relies on our decision in *Harris* v. *United States*, 390 U. S. 234 (1968), to validate the initial intrusion into the trunk, and then the plain view doctrine to justify the warrantless seizure of the items.

We need not decide this issue. Petitioner conceded in the Court of Appeals that this intrusion was a search. Inasmuch as we believe that *Harris* and other decisions control this case even if the intrusion is characterized as a search, we need not deal with petitioner's belated contention.

towed to a private garage. Second, both the state courts and the district courts found as a fact that the search of the trunk to retrieve the revolver was "standard procedure in [that police] department," to protect the public from the possibility that a revolver would fall into untrained or perhaps malicious hands. Although the trunk was locked, the car was left outside, in a lot seven miles from the police station to which respondent had been taken, and no guard was posted over it. For reasons not apparent from the opinion of the Court of Appeals, that court concluded that as "no further evidence was needed to sustain" the drunk driving charge, "[t]he search must therefore have been for incriminating evidence of other offenses." — F. 2d —. While that court was obligated to exercise its independent judgment on the underlying constitutional issue presented by the facts of this case, it was not free on this record to disregard these findings of fact. Particularly in nonmetropolitan jurisdictions such as those involved here, enforcement of the traffic laws and supervision of vehicle traffic may be a large part of a police officer's job. We believe that the Court of Appeals should have accepted, as did the state court and the District Court, the findings with respect to Officer Weiss' specific motivation and the fact that the procedure he followed was "standard."

The Court of Appeals relied, and respondent now relies, primarily on *Preston* v. *United States*, 376 U. S. 354 (1964), to conclude that the warrantless search was unconstitutional and the seized items inadmissible. In that case, the police received a telephone call at 3 a. m. from a caller who stated that "three suspicious men acting suspiciously" had been in a car in the business district of Newport, Kentucky, for five hours; four policemen investigated and, after receiving evasive explanations and

learning that the suspects were unemployed and apparently indigent, arrested the three for vagrancy. The automobile was cursorily searched, then towed to a police station and ultimately to a garage, where it was searched after the three men had been booked. That search revealed two revolvers in the glove compartment; a subsequent search of the trunk resulted in the seizure of various items later admitted in a prosecution for conspiracy to rob a federally insured bank. In that case the respondent attempted to justify the warrantless search and seizure of the trunk and the items therein "as incidental to a lawful arrest." 376 U. S., at 367. The Court rejected the asserted "search incident" justification for the warrantless search in the following terms:

> "But these justifications are absent where a search is remote in time or place from the arrest. Once an accused is under arrest and in custody, then a search made at another place, without a warrant, is simply not incident to the arrest."

It would be possible to interpret *Preston* broadly, and to argue that it stands for the proposition that on those facts there could have been no constitutional justification advanced for the search. But we take the opinion as written, and hold that it stands only for the proposition that the search challenged there could not be justified as one incident to an arrest. See *Chambers* v. *Maroney, supra; Cooper* v. *California, supra.* We believe that the instant case is controlled by principles that may be extrapolated from *Harris* v. *United States, supra,* and *Cooper* v. *California, supra.*

In *Harris,* petitioner was arrested for robbery. As petitioner's car had been identified leaving the site of the robbery, it was impounded as evidence. A regulation of the District of Columbia Police Department

required that an impounded vehicle be searched, that all valuables be removed, and that a tag detailing certain information be placed on the vehicle. In compliance with this regulation, and without a warrant, an officer searched the car and, while opening one of the doors, spotted an automobile registration card, belonging to the victim, lying face up on the metal door stripping. This item was introduced into evidence at petitioner's trial for robbery. In rejecting the contention that the evidence was inadmissible, the Court stated:

> "The admissibility of evidence found as a result of a search under the police regulation is not presented by this case. The precise and detailed findings of the District Court, accepted by the Court of Appeals, were to the effect that the discovery of the card was not the result of a search of the car, but of a measure taken to protect the car while it was in police custody. Nothing in the Fourth Amendment requires the police to obtain a warrant in these narrow circumstances.
>
> "Once the door had been lawfully opened, the registration card . . . was plainly visible. It has long been settled that objects falling in the plain view of an officer who has a right to be in the position to have that view are subject to seizing and may be introduced in evidence." 390 U. S., at 236.

In *Cooper*, the petitioner was arrested for selling heroin, and his car impounded pending forfeiture proceedings. A week later, a police officer searched the car and found, in the glove compartment, incriminating evidence subsequently admitted at petitioner's trial. This Court upheld the validity of the warrantless search and seizure with the following language:

> "This case is not *Preston*, nor is it controlled by it. Here the officers seized petitioner's car because

they were required to do so by state law. They seized it because of the crime for which they arrested petitioner. They seized it to impound it and they had to keep it until forfeiture proceedings were concluded. Their subsequent search of the car—whether the State had 'legal title' to it or not—was closely related to the reason petitioner had been arrested, the reason the car had been impounded, and the reason it was being retained. The forfeiture of petitioner's car did not take place until over four months after it was lawfully seized. It would be unreasonable to hold that the police, having to retain the car in their custody for such a length of time, had no right, even for their own protection, to search it." 386 U. S., at 61–62.

These decisions, while not on all fours with the instant case, lead us to conclude that the intrusion into the trunk of the 1967 Thunderbird at the garage was not unreasonable within the meaning of the Fourth and Fourteenth Amendments solely because a warrant had not been obtained by Officer Weiss after he left the hospital. The police did not have actual, physical custody of the vehicle as in *Harris* and *Cooper*, but the vehicle had been towed there at the officers' directions. These officers in a rural area were simply reacting to the effects of an accident—one of the recurring practical situations that results from the operation of motor vehicles and with which local police officers must deal every day. The Thunderbird was not parked adjacent to the dwelling place of the owner as in *Coolidge, supra*, nor simply momentarily unoccupied on a street. Rather, like an obviously abandoned vehicle, it represented a nuisance, and there is no suggestion in the record that the officers' action in exercising control over it by having it towed away was unwarranted either in terms of state law or sound police procedure.

In *Harris* the justification for the initial intrusion into the vehicle was to safeguard the owner's property, and in *Cooper* it was to guarantee the safety of the custodians. Here the justification, while different, was as immediate and constitutionally reasonable as those in *Harris* and *Cooper:* concern for the safety of the general public who might be endangered if an intruder removed a revolver from the trunk of the vehicle. The record contains uncontradicted testimony to support the findings of the state courts and District Court. Furthermore, although there is no record basis for discrediting such testimony, it was corroborated by the circumstantial fact that at the time the search was conducted Officer Weiss was ignorant of the fact that a murder, or any other crime, had been committed. While perhaps in a metropolitan area the responsibility to the general public might have been discharged by the posting of a police guard during the night, what might be normal police procedure in such an area may be neither normal nor possible in Kewaskum, Wisconsin. The fact that the protection of the public might, in the abstract, have been accomplished by "less intrusive" means does not, by itself, render the search unreasonable. Cf. *Chambers* v. *Maroney, supra.*

The Court's previous recognition of the distinction between motor vehicles and dwelling places leads us to conclude that the type of caretaking "search" conducted here of a vehicle that was neither in the custody nor on the premises of its owner, and that had been placed where it was by virtue of lawful police action, was not unreasonable solely because a warrant had not been obtained. The Framers of the Fourth Amendment have given us only the general standard of "unreasonableness" as a guide in determining whether searches and seizures meet the standard of that Amendment in those cases where a warrant is not required. Very little that has been

said in our previous decisions, see *Cooper, supra, Harris, supra, Chambers, supra,* and very little that we might say here can usefully refine the language of the Amendment itself in order to evolve some detailed formula for judging cases such as this. Where, as here, the trunk of an automobile, which the officer reasonably believed to contain a gun, was vulnerable to intrusion by vandals, we hold that the search was not "unreasonable" within the meaning of the Fourth and Fourteenth Amendments.

III

The Wisconsin Supreme Court ruled that the sock and the portion of the floor mat were validly seized from the 1960 Dodge. The Fond du Lac county officer who looked through the window of the Dodge after McKinney's body had been found saw the bloody seat and briefcase, but not the sock or floor mat. Consequently, these two items were not listed in the application for the warrant, but the Dodge was the item "particularly described" to be searched in the warrant. The warrant was validly issued and the police were authorized to search the car. The reasoning of the Wisconsin Supreme Court was that although these items were not listed to be seized in the warrant, the warrant was valid and in executing it the officrs discovered the sock and mat in plain view and therefore could constitutionally seize them without a warrant.

The Court of Appeals held that the seizure of the two items on September 13th could not be justified under the plain view doctrine. The reasoning of that court hinged on its understanding that the warrant to search the Dodge had been returned and was *functus officio* by the time Officer Mauer of the Crime Laboratory came upon the sock and the floor mat. The court stated:

> "There was no continuing authority under the warrant issued the previous night [the 12th]. First,

these items were not described in the warrant and presumably were not observed that night [the 12th]. Second, when the warrant was returned—before Mauer came to the scene—it was *functus officio*. A 'new ball game,' so to speak, began when Mauer made his 'inspection.'"

The record is so indisputably clear that the return of the warrant was filed on the 14th, not sometime prior to Mauer's search on the 13th, that we are somewhat at a loss to understand how the Court of Appeals arrived at its factual conclusion. The warrant to search the Dodge was issued on the 12th, and, although a return of the warrant was prepared by a Fond du Lac County officer at some time on the 13th (whether before or after Mauer's search is impossible to determine), it was not filed in the state court until the 14th, at which time a hearing was held. The seizures of the sock and the floor mat occurred while a valid warrant was outstanding, and thus could not be considered unconstitutional under the theory advanced below. As these items were constitutionally seized, we do not deem it constitutionally significant that they were not listed in the return of the warrant. The ramification of that "defect," if such it was, is purely a question of state law.

We therefore need not reach the question of whether the seizure of the two items from the Dodge would have been valid because the entire car had been validly seized as evidence and impounded pursuant to a valid warrant, cf. *Harris* v. *United States*, *supra*, *Cooper* v. *California*, *supra*, or whether a search of the back seat of this car, located at it was in an open field, required a search warrant at all. See *Hester* v. *United States*, 265 U. S. 57, 59.

The judgment of the Court of Appeals is

Reversed.

SUPREME COURT OF THE UNITED STATES

No. 72–586

Elmer O. Cady, Warden, Petitioner, v. Chester J. Dombrowski. | On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

[June 21, 1973]

MR. JUSTICE BRENNAN, with whom MR. JUSTICE DOUGLAS, MR. JUSTICE STEWART, and MR. JUSTICE MARSHALL join, dissenting.

In upholding the warrantless search of respondent's rented Thunderbird, the Court purports merely to rely on our prior decisions dealing with automobile searches. It is clear to me, however, that nothing in our prior decisions supports either the reasoning or the result of the Court's decision today. I therefore dissent and would hold the search of the Thunderbird unconstitutional under the Fourth and Fourteenth Amendments.

The relevant facts are these. Respondent, an off-duty Chicago policeman, was arrested by police on a charge of drunken driving following a one-car automobile accident in which respondent severely damaged his rented 1967 Thunderbird. The car was towed from the scene of the accident to a private garage and, some two and one-half hours later, one of the arresting officers drove to the garage and, without a search warrant or respondent's consent, conducted a thorough search of the car for the alleged purpose of finding respondent's service revolver which was not on respondent's person and had not been found during an initial search of the car at the scene of the accident. In the trunk of the car, the officer found and seized numerous items that eventually linked respondent to the death of one Herbert McKinney and

ultimately contributed to respondent's conviction for murder.

The Court begins its analysis by recognizing, as clearly it must, that the Fourth Amendment's prohibition against "unreasonable searches and seizures" is shaped by the warrant clause, and thus that a warrantless search of private property is per se "unreasonable" under the Fourth Amendment unless within one of the few specifically established and well delineated exceptions. *Almeida-Sanchez* v. *United States*, — U. S. — (1973); *Katz* v. *United States*, 389 U. S. 347, 357 (1967); *Camara* v. *Municipal Court*, 387 U. S. 523, 528–529 (1967). At the same time, the Court also recognizes that one of the established exceptions to the warrant requirement is the search of an automobile on the highway where there is probable cause to support the search and "where it is not practicable to secure a warrant because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought." *Carroll* v. *United States*, 267 U. S. 132, 153 (1925). See also *Coolidge* v. *New Hampshire*, 403 U. S. 443 (1971); *Chambers* v. *Maroney*, 399 U. S. 42 (1970); *Dyke* v. *Taylor Implement Mfg. Co.*, 391 U. S. 216 (1968). But the search of the Thunderbird plainly cannot be sustained under the "automobile exception," for our prior decisions make it clear that where, as in this case, there is no reasonable likelihood that the the automobile would or could be moved, the "automobile exception" is simply irrelevant. *Coolidge* v. *New Hampshire*, *supra*, at 461; *Carroll* v. *United States*, *supra*, at 156.

Another established exception to the warrant requirement is a search incident to a valid arrest. *Chimel* v. *California*, 395 U. S. 752 (1969). But the search of the Thunderbird cannot be sustained under this exception, because even assuming that such a search would have been within the permissible scope of a search incident to

an arrest for drunken driving, it is clear that under *Preston* v. *United States*, 376 U. S. 364, 368 (1964), "the search was too remote in time or place to have been made as incidental to the arrest."

A third exception to the warrant requirement is the seizure of evidence in "plain view." Thus, in *Harris* v. *United States*, 390 U. S. 234 (1968), we upheld the seizure of an automobile registration card that fell within plain view of a police officer as he opened the door of an impounded automobile to roll up the windows. But, as we cautioned in *Coolidge*, *supra*, at 466, "[w]hat the 'plain view' cases have in common is that the police officer in each of them had a prior justification for an intrusion in the course of which he came inadvertently across a piece of evidence incriminating the accused." In *Harris*, the prior justification for the intrusion by the police was to roll up the windows and lock the doors "to protect the car while it was in police custody." 390 U. S., at 236. "[T]he discovery of the card was not the result of a search," we said, and "in these narrow circumstances" the "plain view" exception to the warrant requirement was fully applicable. In the present case, however, the sole purpose for the initial intrusion into the vehicle was to *search* for the gun. Thus, the seizure of the evidence from the trunk of the car can be sustained under the "plain view" doctrine only if the search for the gun was itself constitutional. Reliance on the "plain view" doctrine in this case is therefore misplaced since the antecedent search cannot be sustained.

Another exception to the warrant requirement is that which sustains a search in connection with the seizure of an automobile for purposes of forfeiture proceedings. In *Cooper* v. *California*, 386 U. S. 58 (1967), the Court upheld the warrantless search of an automobile after it had been lawfully impounded pursuant to a California statute mandating the seizure and forfeiture of any

vehicle used to facilitate the possession or transportation of narcotics. There, however, the police were authorized to treat the car in their custody as if it were their own, and the search was sustainable as an integral part of their right of retention. This case, of course, is poles away from *Cooper*. The Thunderbird was not subject to forfeiture proceedings. On the contrary, ownership of the car remained exclusively in respondent and the sole reason that the police took even temporary possession of the car was to remove it from the highway until respondent could claim it.

Clearly, therefore, the Court's decision today finds no support in any of the established exceptions. The police knew what they were looking for and had ample opportunity to obtain a warrant. Under those circumstances, our prior decisions make it clear that the Fourth Amendment required the police to obtain a warrant prior to the search. *Carroll* v. *United States*, *supra*, at 156. Thus, despite the Court's asserted adherence to the principles of our prior decisions, in fact the decision actually rests on a subjective view of what is deemed acceptable in the way of investigative functions performed by rural police officers. But the applicability of the Fourth Amendment cannot turn on fine-line distinctions between criminal and investigative functions. On the contrary, "[i]t is surely anomalous to say that the individual and his private property are fully protected by the Fourth Amendment only when the individual is suspected of criminal behavior," *Camara* v. *Municipal Court*, *supra*, 387 U. S., at 530, for "[t]he basic purpose of [the Fourth] Amendment, as recognized in countless decisions of this Court, is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials." *Id.*, at 528. Thus, the fact that the professed purpose of the contested search was to protect the public safety rather than to gain incriminating evi-

dence does not of itself eliminate necessity for compliance with the warrant requirement. Although a valid public interest may establish probable cause to search, *Camara* v. *Municipal Court, supra,* and *See* v. *City of Seattle,* 387 U. S. 541 (1967), make clear that, absent exigent circumstances, the search must be conducted pursuant to a "suitably restricted search warrant." 387 U. S., at 539. See also *Almeida-Sanchez* v. *United States, supra,* — U. S. — (1973). And certainly there were no exigent circumstances to justify the warrantless search made of the Thunderbird. For even assuming that the officer had reason to believe that respondent's service revolver was in the Thunderbird, the police had left the car in the custody of a private garage and did not return to look for the gun until two and one-half hours later. Moreover, although the arresting officers were at all times aware that respondent was an off-duay Chicago policeman, the officers never once inquired of respondent as to whether he was carrying a gun and, if so, where it was located. I can only conclude, therefore, that what the Court does today in the name of an investigative automobile search is in fact a serious departure from established Fourth Amendment principles. And since in my view that departure is totally unjustified, I would affirm the judgment of the Court of Appeals invalidating the search of the Thunderbird and remand the case to the District Court for determination whether the evidence seized during the search of the Dodge and the farm were the fruit of the unlawful search of the Thunderbird. See *Alderman* v. *United States,* 394 U. S. 165 (1969); *Wong Sun* v. *United States,* 371 U. S. 471 (1963).